No. 14-103

Title:	Baker Botts L.L.P., et al., Petitioners v. ASARCO LLC
Docketed:	July 30, 2014
Lower Ct:	United States Court of Appeals for the Fifth Circuit
Case Nos.:	(12-40997, 12-40998, 13-40409)
Decision Date:	April 30, 2014

Questions Presented

—Date—	——Proceedings and Orders——
Jul 29 2014	Petition for a writ of certiorari filed. (Response due August 29, 2014)
Jul 31 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners.
Aug 15 2014	Brief of respondent ASARCO, L.L.C. in opposition filed.
Aug 29 2014	Brief amicus curiae of The State Bar of Texas Bankruptcy Law Section filed.
Aug 29 2014	Brief amicus curiae of The Business Law Section of The Florida Bar filed.
Sep 2 2014	Reply of petitioners Baker Botts, L.L.P., et al. filed.
Sep 3 2014	DISTRIBUTED for Conference of September 29, 2014.
Oct 2 2014	Petition GRANTED.
Oct 8 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners.
Oct 22 2014	The time to file the joint appendix and petitioners' brief on the merits is extended to and including December 3, 2014.
Oct 22 2014	The time to file respondent's brief on the merits is extended to and including January 20, 2015.
Nov 10 2014	Motion to dispense with printing the joint appendix filed by petitioners Baker Botts, L.L.P., et al.
Nov 17 2014	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Dec 3 2014	Brief of petitioners Baker Botts, L.L.P., et al. filed.
Dec 8 2014	Brief amicus curiae of National Association of Bankruptcy Trustees filed.
Dec 10 2014	Brief amicus curiae of Neutral Fee Examiners in support of neither party filed.
Dec 10 2014	Brief amici curiae of Committee on Bankruptcy and Corporate Reorganization of the Association of the Bar of the City of New York, et al. filed.
Dec 10 2014	Brief amicus curiae of National Association of Consumer Bankruptcy Attorneys filed.
Dec 10 2014	Brief amicus curiae of United States filed.
Dec 10 2014	Proposal from counsel for amicus curiae National Association of Consumer Bankruptcy Attorneys to lodge a copy of the American Bankruptcy Institute National Report on Professional Compensation in Bankruptcy Cases (G.R. Warner, rep. 1991).

Dec 10 2014	Brief amici curiae of Bankruptcy Law Scholars filed.
Dec 10 2014	Brief amicus curiae of National Association of Chapter Thirteen Trustees filed.
Dec 10 2014	Brief amicus curiae of The State Bar of Texas Bankruptcy Law Section filed.
Dec 10 2014	Brief amici curiae of Former Bankruptcy Judges Leif M. Clark and Judith K. Fitzgerald filed.
Dec 22 2014	SET FOR ARGUMENT ON Wednesday, February 25, 2015
Dec 22 2014	Record requested from U.S.C.A. 5th Circuit.
Dec 29 2014	The record from U.S.C.A. 5th Circuit is located on PACER.
Dec 29 2014	The record from U.S.D.C. Southern District of Texas is located on PACER.
Jan 7 2015	CIRCULATED.
Jan 8 2015	CAS Record received on two thumb drives, one is under seal.
Jan 14 2015	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jan 20 2015	Brief of respondent ASARCO, L.L.C. filed. (Distributed)
Jan 21 2015	Brief amici curiae of Professors Richard Aaron, et al. filed. (Distributed)
Feb 13 2015	Reply of petitioners Baker Botts, L.L.P., et al. filed. (Distributed)
Feb 20 2015	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Feb 25 2015	Argued. For petitioners: Aaron Streett, Houston, Tex.; and Brian H. Fletcher, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondent: Jeffrey L. Oldham, Houston, Tex.
Jun 15 2015	Adjudged to be AFFIRMED. Thomas, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia, Kennedy, and Alito, JJ., joined, and in which Sotomayor, J., joined as to all but Part III-B-2. Sotomayor, J., filed an opinion concurring in part and concurring in the judgment. Breyer, J., filed a dissenting opinion, in which Ginsburg and Kagan, JJ., joined.

14-103

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BAKER BOTTS L.L.P. AND JORDAN, HYDEN, WOMBLE, CULBRETH & HOLZER, P.C.,
Petitioners,

v.

ASARCO LLC,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED

Section 330(a) of the Bankruptcy Code grants discretion to bankruptcy judges to award "reasonable compensation for actual, necessary services rendered by" an attorney or other professional employed by the estate. 11 U.S.C. §330(a)(1). Before any compensation may be awarded, the Code requires professionals to complete a detailed fee application, to which any party in interest may object. It is undisputed that the *preparation* of such a fee application is compensable. But the circuits have now divided over whether *defending* it is likewise compensable. The Ninth Circuit, like the vast majority of lower courts, has held that bankruptcy judges may award compensation for the defense of a fee application, at least when the defense is meritorious and successful. It so held in part because categorically denying compensation would undermine the statutory requirement that bankruptcy professionals' compensation not be diluted compared to that of non-bankruptcy practitioners. But the Fifth Circuit, in the judgment below, held that such compensation is never authorized by §330(a).

The question presented is whether §330(a) grants bankruptcy judges discretion to award compensation for the defense of a fee application.

PARTIES TO THE PROCEEDINGS BELOW

Baker Botts L.L.P. was the fee applicant in the bankruptcy court, the appellee in district court, and the appellee in the court of appeals.

Jordan, Hyden, Womble, Culbreth & Holzer, P.C. was the fee applicant in the bankruptcy court, the appellee in district court, and the appellee in the court of appeals.

ASARCO LLC was the debtor in the bankruptcy court, the appellant in the district court, and the appellant in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Petitioner Baker Botts L.L.P. states that it is a limited liability partnership, which has no parent company. Petitioner Jordan, Hyden, Womble, Culbreth & Holzer, P.C. states that it is a professional corporation, which has no parent company, and no publicly held company owns 10%.

Respondent ASARCO LLC is wholly owned, directly or indirectly, by Americas Mining Corporation, which in turn is wholly owned by Grupo Mexico, which is publicly traded in Mexico.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceedings	ii
Corporate Disclosure Statement	iii
Opinions Below	1
Statement of Jurisdiction	1
Statute Involved	2
Preliminary Statement	4
Statement	5
I. Background	5
A. The statutory framework	5
B. The "most successful Chapter 11" case in history	6
C. Reorganized ASARCO's fee attack	8
II. Proceedings Below	9
A. Proceedings in the bankruptcy court	9
B. Proceedings in the district court and on remand	9
C. The court of appeals' decision	10
Reasons for Granting the Petition	12
I. The Fifth Circuit's Judgment Divides The Circuits About An Important Question Of Law	12
A. The courts are divided	13
1. Statutory background	13
2. Ninth Circuit case law enforced Congress's parity principle	15

TABLE OF CONTENTS—Continued

Page

3. The Fifth Circuit's holding conflicts with the Ninth Circuit's legal standard 18

4. Most lower courts have rejected the Fifth Circuit's categorical prohibition 21

B. The issue is important and recurring and arises in an especially good vehicle 22

1. Fee assessment is central to bankruptcy 22

2. The issue affects all professionals 24

3. This case is an especially good vehicle 24

II. The Judgment Below Is Wrong And Should Be Reversed 25

A. Section 330(a)'s text includes discretion to award compensation for defending fee applications 25

1. The statute grants broad discretion to award "reasonable compensation" 25

2. Fee defense is "necessary" for case administration and beneficial to the estate 27

3. Preparation and defense serve the same function 28

B. Congressional purposes, as reflected in the text and history of the Code, support compensability for successful fee defenses 31

TABLE OF CONTENTS—Continued

Page

C. Policy concerns cut against the Fifth Circuit's categorical rule 34

Conclusion 36

Appendix A – Fifth Circuit Opinion (April 30, 2014) 1a

Appendix B – District Court Opinion and Order on Baker Botts' Fee Application (August 8, 2012) 22a

Appendix C – Bankruptcy Court Opinion and Order on Baker Botts' Fee Application (July 20, 2011) 55a

Appendix D – Bankruptcy Court Supplemental Findings of Fact and Conclusions of Law on Remand (September 27, 2012) 147a

Appendix E – Bankruptcy Court Order on Remand (September 27, 2012) 152a

Appendix F – District Court Opinion and Judgment Affirming Bankruptcy Court's Order on Remand (March 26, 2013) 157a

Appendix G – Cases Addressing Compensability of Defense Fees 167a

TABLE OF AUTHORITIES

Page

CASES

Alyeska Pipeline Serv. Co. v. *Wilderness Soc'y*,
421 U.S. 240 (1975) 31

ASARCO, L.L.C. v. *Barclays Capital, Inc.*,
702 F.3d 250 (5th Cir. 2012) 26

Boyd v. *Engman*,
404 B.R. 467 (W.D. Mich. 2009) 28, 29

Clark v. *Rameker*,
573 U.S. __ (2014) (slip op.) 25

Cruz v. *Hauck*,
762 F.2d 1230 (5th Cir. 1985) 34

Frazin v. *Haynes & Boone LLP*,
413 B.R. 378 (Bankr. N.D. Tex. 2009) 22

Grant v. *George Schumann Tire & Batt. Co.*,
908 F.2d 874 (11th Cir. 1990) 11, 19, 20, 25

In re Brous,
370 B.R. 563 (Bankr. S.D.N.Y. 2007) 22

In re Busy Beaver Bldg. Ctrs. Inc.,
19 F.3d 833 (3d Cir. 1994) 23

In re CCT Commc'ns, Inc.,
07-10210 SMB, 2010 WL 3386947
(Bankr. S.D.N.Y. Aug. 24, 2010) 22

In re Chavez,
157 B.R. 30 (D. Colo. 1993), aff'd, 13
F.3d 404 (10th Cir. 1993) 24

In re Erewhon, Inc.,
21 B.R. 79 (Bankr. D. Mass. 1982) 22

TABLE OF AUTHORITIES—Continued

Page

In re First State Bancorp.,
No. 7-11-11916-JA, 2014 WL 1203141
(Bankr. D.N.M. Mar. 24, 2014) 28

In re Geneva Steel Co.,
258 B.R. 799 (Bankr. D. Utah 2001) 24

In re Moss,
320 B.R. 143 (Bankr. E.D. Mich. 2005) 22

In re New Boston Coke Corp.,
299 B.R. 432 (Bankr. E.D. Mich. 2003) 22

In re Nucorp Energy, Inc.,
764 F.2d 655 (9th Cir. 1985) 15, 16, 17, 19

In re Quigley Co., Inc.,
500 B.R. 347 (Bankr. S.D.N.Y. 2013) 22

In re Riverside-Linden Inv. Co.,
945 F.2d 320 (9th Cir. 1991) 16, 17

In re Smith,
317 F.3d 918 (9th Cir. 2002) ..... *passim*

In re St. Rita's Assocs. Private Placement, L.P.,
260 B.R. 650 (Bankr. W.D.N.Y. 2001) 22

In re Teraforce Tech. Corp.,
347 B.R. 838 (Bankr. N.D. Tex. 2006) 22

In re UNR Indus., Inc.,
986 F.2d 207 (7th Cir. 1993) 32

In re Walters,
No. BKR-04-06902-JM7, 2006 WL
6589027 (Bankr. S.D. Cal. May 30,
2006) 24

In re Wind N' Wave,
509 F.3d 938 (9th Cir. 2007) 17, 18

TABLE OF AUTHORITIES—Continued

Page

In re Wireless Telecomms. Inc.,
449 B.R. 228 (Bankr. M.D. Pa. 2011) 22

In re Worldwide Direct Inc.,
334 B.R. 108 (D. Del. 2005) 21, 23, 31, 32, 36

J.R. Cousin Indus., Inc. v. *Menard, Inc.*,
127 F.3d 580 (7th Cir. 1997) 31

Jacobowitz v. *Double Seven Corp.*,
378 F.2d 405 (9th Cir. 1967) 13

Lamie v. *U.S. Trustee*,
540 U.S. 526 (2004) 16

Williams v. *Hanover Hous. Auth.*,
113 F.3d 1294 (1st Cir. 1997) 34

STATUTES

11 U.S.C. §327(a) 5

11 U.S.C. §330(a) ..... *passim*

11 U.S.C. §330(a)(1) ..... *passim*

11 U.S.C. §330(a)(1)(A) 6, 26

11 U.S.C. §330(a)(2) 6

11 U.S.C. §330(a)(3) 6, 26, 30

11 U.S.C. §330(a)(3)(C) 14, 26, 28

11 U.S.C. §330(a)(3)(F) 32

11 U.S.C. §330(a)(4) 15, 26, 27, 29

11 U.S.C. §330(a)(4)(A) 6

11 U.S.C. §330(a)(4)(A)(ii) 27

11 U.S.C. §330(a)(6) 6, 15, 26, 29, 30

11 U.S.C. §503(b)(2) 27

11 U.S.C. §1107(a) 5

TABLE OF AUTHORITIES—Continued

Page

Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994)..... 14, 20, 21, 22, 28, 30, 31

RULES

Fed. R. Bankr. P. 2016 ..... 6, 23

Fed. R. Bankr. P. 9011 36

Fed. R. Civ. P. 11 36

MISCELLANEOUS

Collier on Bankruptcy (16th ed. 2013).... 14, 21, 23, 24

H.R. Rep. No. 95-595 (1977) 13

Springer, Damned If You Do, Damned If You Don't—Current Issues for Professionals Seeking Compensation in Bankruptcy Cases Under 11 U.S.C. §330, 87 Am. Bankr. L.J. 525 (2013) .. 13, 14, 21, 36

IN THE

Supreme Court of the United States

BAKER BOTTS L.L.P. AND JORDAN, HYDEN, WOMBLE, CULBRETH & HOLZER, P.C.,
Petitioners,

v.

ASARCO LLC,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Baker Botts L.L.P. and Jordan, Hyden, Womble, Culbreth & Holzer, P.C., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The court of appeals' opinion (App., *infra*, 1a-21a) is reported at 751 F.3d 291. The district court's opinion (App., *infra*, 22a-54a) is reported at 477 B.R. 661. The bankruptcy court's opinion (App., *infra*, 55a-145a) is unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was filed on April 30, 2014. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

11 U.S.C. § 330(a) provides:

(a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103—

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

(2) The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested.

(3) In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

(4)(A) Except as provided in subparagraph (B), the court shall not allow compensation for—

(i) unnecessary duplication of services; or

(ii) services that were not—

(I) reasonably likely to benefit the debtor's estate; or

(II) necessary to the administration of the case.

(B) In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.

(5) The court shall reduce the amount of compensation awarded under this section by the amount of any interim compensation awarded under section 331, and, if the amount of such interim compensation exceeds the amount of compensation awarded under this section, may order the return of the excess to the estate.

(6) Any compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application.

(7) In determining the amount of reasonable compensation to be awarded to a trustee, the court shall treat such compensation as a commission, based on section 326.

PRELIMINARY STATEMENT

This statutory-construction case presents a pure question of law that now divides the circuits: Under § 330(a) of the Bankruptcy Code, do bankruptcy judges possess discretion to award compensation to a professional for successfully defending a fee application?

Section 330(a) provides for the "reasonable compensation" of attorneys and other professionals who work on behalf of an estate. To receive compensation, professionals must submit a detailed fee application, which may be extensively challenged by interested parties who were not the professional's client, including the U.S. Trustee. Congress thereby provided for careful monitoring of fees, and gave bankruptcy judges broad discretion to make appropriate awards. But Congress simultaneously adopted the principle of "parity," under which bankruptcy professionals' compensation may not be diminished compared to practitioners in other areas of law. This marked a major change from pre-Code practice, which authorized lesser comparative fees so as to preserve the economy of the estate. Congress changed direction largely to ensure participation of competent counsel in all bankruptcy proceedings, for if fees remained systematically lower than elsewhere, it concluded, the most qualified practitioners would abandon bankruptcy practice. Bankruptcy compensation may not be diluted, therefore, without violating the parity principle.

The background of this case illustrates how the competing interpretations of § 330(a) generate irreconcilable outcomes. This was one of the largest and most successful Chapter 11 bankruptcies in history. But Reorganized ASARCO is now controlled by a parent company that had sought to defraud ASARCO and that bitterly but unsuccessfully fought the exposure of that fraud by ASARCO's bankruptcy counsel, Baker Botts. Exacting revenge, Reorganized ASARCO attacked all of Baker Botts' fees with

such a barrage of objections that, as is undisputed, petitioners reasonably spent over $5 million solely to defend their fee applications. Ultimately, *every single objection* was overruled, and Reorganized ASARCO pursued *none* of them in the district court, much less the court of appeals. The bankruptcy court awarded Baker Botts compensation for its defense costs, none of which would be borne by creditors, and the district court affirmed.

In reversing, the Fifth Circuit held that § 330(a) *never* authorizes such compensation, even though bankruptcy practitioners' recoveries will necessarily be diluted as a result. By contrast, the Ninth Circuit long has read § 330(a) to authorize discretion to grant awards, partly because of that provision's parity and anti-dilution principle. The conflict is outcome determinative here. This issue recurs repeatedly in bankruptcy courts nationwide, which overwhelmingly have adopted the construction of § 330(a) that permits defense fees in appropriate circumstances. The question for this Court is which circuit's construction of § 330(a) is correct.

STATEMENT

I. BACKGROUND

A. The statutory framework

A debtor-in-possession in a Chapter 11 bankruptcy, "with the court's approval, may employ one or more attorneys * * * to represent [it] in carrying out [its] duties under this title." 11 U.S.C. §§ 327(a), 1107(a).[1] Any bankruptcy professional seeking compensation or expenses from the estate must file a fee application including "a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the

[1] Statutory citations, unless otherwise indicated, refer to the Bankruptcy Code, Title 11 of the U.S. Code.

amounts requested." Fed. R. Bankr. P. 2016.[2] Compensation requires "notice to the parties in interest and the United States Trustee and a hearing," § 330(a)(1), and any party, including the Trustee and the court itself, may object and ask the court to award "less than the amount of compensation that is requested," § 330(a)(2).

Section 330(a) guides the determination of whether services are compensable and any resulting amounts. Bankruptcy courts may broadly award "reasonable compensation for actual, necessary services rendered." § 330(a)(1)(A). The statute enunciates only two prohibitions on compensation: for (1) "unnecessary duplication of services" and (2) services that were neither "reasonably likely to benefit the debtor's estate" nor "necessary to the administration of the case." § 330(a)(4)(A).

For everything else, "[i]n determining the amount of reasonable compensation to be awarded," bankruptcy judges must consider "the nature, the extent, and the value of such services, taking into account all relevant factors," § 330(a)(3). They must also consider six express but non-exhaustive factors. § 330(a)(3)(A)-(F). The statute directs a specific method of assessing compensation for only one service: Courts must base "compensation awarded for the preparation of a fee application * * * on the level and skill reasonably required to prepare the application." § 330(a)(6).

B. The "most successful Chapter 11" case in history

ASARCO, "an integrated copper mining, smelting, and refining company," App., *infra*, 2a, entered Chapter 11 bankruptcy in 2005. It faced cash-flow deficiencies; billions in asbestos, environmental, and toxic-tort liability; corporate-governance and tax problems; a striking workforce; and a litigious parent company, Americas

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[2] References to "compensation" include both fee compensation and expense reimbursement, both of which are involved in this case.

Mining Corporation. *Id.* at 62a-66a. When Baker Botts became counsel to the ASARCO estate, chances of reorganization appeared "slim." *Id.* at 62a.[3] But by the end of the case, ASARCO had been successfully reorganized. All three lower courts agreed that Baker Botts' efforts transformed "ASARCO * * * from a broke and broken company to a reorganized ASARCO, cleansed of its historical liabilities and well-positioned to compete effectively in the world of commerce." *Id.* at 65a. The results were "nothing short of extraordinary," providing *full* payment (with interest and attorneys' fees) to creditors, totaling $3.56 billion. *Id.* at 62a, 70a. It was "probably the most successful Chapter 11 of any magnitude in the history of the Code." *Id.* at 12a, 23a, 100a.

Predictably, it was also among the most complex. App., *infra*, 88a. The turning point was Baker Botts' "successful prosecution of an action to recover ASARCO's crown jewel—its controlling interest in SCC." *Id.* at 68a. Two years before the bankruptcy, the parent had directed the financially-distressed ASARCO to transfer its controlling interest in Southern Copper Corporation (SCC) to the parent. *Id.* at 64a. Baker Botts' fraudulent-transfer prosecution resulted in a judgment against the parent valued at between $7 and $10 billion—the largest in Chapter 11 history and possibly the largest unreversed actual-damages award in American history. *Id.* at 43a & n.11, 68a-69a. The SCC judgment led to the full-payment plan of reorganization, while the parent received release of the judgment and regained control of the newly viable ASARCO. *Id.* at 70a, 84a.

Throughout the bankruptcy, Baker Botts filed thirteen interim fee statements, all of which were paid by the debtor and none of which drew objection from the parent,

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[3] Petitioner Jordan, Hyden, Womble, Culbreth & Holzer, P.C., served as co-counsel; references to Baker Botts include both petitioners.

the U.S. Trustee, or anyone else.

C. Reorganized ASARCO's fee attack

ASARCO ceased being the debtor (and Baker Botts' client) once the plan of reorganization took effect. It became Reorganized ASARCO, controlled by the parent. App., *infra*, 3a. When Baker Botts thereupon filed its final fee application, Reorganized ASARCO launched a massive assault on it—and on *all* previously-approved fees, too. It attacked everything—time-entry descriptions, task codes in invoices, staffing choices, and the necessity and quality of various legal services. *Id.* at 58a, 106a-130a.

Reorganized ASARCO stonewalled every effort at efficiently resolving its objections. It refused, for instance, to specify *which* time entries it found "vague" or improperly "block billed," forcing Baker Botts to self-audit thousands of pages of invoices, culminating in a 1160-page supplement. C.A. Rec. 7469-7470, 34615-35774. Yet less than a month before the fee trial, Reorganized ASARCO served Baker Botts a 104-page report accompanied by a 16-foot-tall stack of schedules containing thousands of pages of individual billing entries alleged to be non-compliant with the U.S. Trustee's guidelines and local rules. C.A. Rec. 7873-74, 8476-34437; Sealed C.A. Rec. 770-1592. Tellingly, the U.S. Trustee joined *none* of these objections, nor indeed *any* objections to Baker Botts' core fees, which totaled about $113 million for the duration of the case. App., *infra*, 58a.

Reorganized ASARCO also demanded immense discovery, forcing production of *every single document* that hundreds of professionals created or received during the 52-month bankruptcy. App., *infra*, 3a. Baker Botts retrieved hundreds of boxes of documents from offsite storage facilities. Reviewing them just to avoid revealing privileged information required 2,440 hours from teams

of lawyers and staff. It ultimately produced 2,350 boxes of hard-copy documents (nearly six million pages) and 189 GB of electronic data (approximately 325,000 documents). *Ibid.* Baker Botts then reserved large conference rooms in its Dallas and Houston offices to permit Reorganized ASARCO's lawyers and experts to review the produced material. Reorganized ASARCO sent just *two* lawyers to review the massive results of discovery it had demanded. They spent only five days and copied 1% of the material. Sealed C.A. Rec. 1918.

II. Proceedings Below

A. Proceedings in the bankruptcy court

The bankruptcy court conducted a six-day fee trial. App., *infra*, 3a. In a detailed opinion, *id.* at 55a-145a, it rejected as meritless *all* of Reorganized ASARCO's objections to Baker Botts' core fees and found Baker Botts entitled to a $4.1 million enhancement of those fees for extraordinary performance and results. *Id.* at 144a. The enhancement, limited to the work done in the SCC litigation, corresponded to the court's finding that Baker Botts' standard rates during the bankruptcy were "approximately 20% lower than an appropriate market rate." *Id.* at 96a, 144a & n.103.

Finally, the court awarded Baker Botts $5 million for the fees it incurred successfully defending its fee application against Reorganized ASARCO's barrage of empty objections. App., *infra*, 144a. It concluded that defense fees were compensation for services that were necessary to the administration of the bankruptcy case and beneficial to the estate. It also concluded that defense fees were essential to prevent dilution of Baker Botts' core fees. *Id.* at 138a.

B. Proceedings in the district court and on remand

On appeal to the district court, Reorganized ASARCO

completely abandoned its objections to the $113 million core fee award, and challenged *only* the enhancement and defense-fee awards. App., *infra*, 4a. The district court affirmed the enhancement, calling the SCC judgment "a once in a lifetime result." *Id.* at 45a.

Following the "vast majority" of lower courts and the Ninth Circuit, it also affirmed fees for defending Baker Botts' core fees (but not for pursuing a fee enhancement). App., *infra*, 45a-46a, 49a. The district court remanded to determine whether any of the $5 million defense-fee award related to the enhancement; the bankruptcy court confirmed that it did not. *Id.* at 4a, 50a, 149a-150a. The district court affirmed the final fee award. *Id.* at 4a, 157a-166a.[4]

C. The court of appeals' decision

The court of appeals affirmed the lower courts' fee enhancement award, agreeing that "'[a] seven billion dollar judgment, which is recoverable, which saves a company, and funds a 100% recovery for all concerned is a once in a lifetime result.'" App., *infra*, 9a (quoting *id.* at 44a). It found that "the results" were due to Baker Botts' "'creativity, tenacity and talent,'" not weak adversaries or good luck. *Id.* at 12-13a (quoting *id.* at 68a).

Nonetheless, the Fifth Circuit reversed the award of compensation to Baker Botts for defending its core-fee application. It held that, as a matter of law, bankruptcy courts lack discretion to award such fees. App., *infra*, 15a-16a. The court recognized that the relevant facts were undisputed and one-sided: Baker Botts' performance was "'exemplary * * * in a wide spectrum of legal specialties,'" *id.* at 12a (quoting *id.* at 62a), and "[t]he results [it achieved] were * * * 'probably the most success-

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[4] Like the bankruptcy court, the district court noted that the same principles supporting trial-level defense fees would justify an eventual award of appellate defense fees.

ful Chapter 11 [bankruptcy] in the history of the [Bankruptcy] Code,'" *ibid.* (quoting *id.* at 100a). It acknowledged that Reorganized ASARCO's "large scale" fee challenge was wholly unsuccessful yet was incredibly burdensome. *Id.* at 3a. The court conceded that the "huge cost" Baker Botts incurred "defending [its] core fees" was "a drastic reduction in absolute terms." *Id.* at 18a-19a. Yet, it concluded, litigating the fee application *never* "benefit[s] a debtor's estate" and thus is *never* compensable under § 330(a). *Id.* at 15a-16a.

The Fifth Circuit recognized that the circuits were divided. It expressly rejected a Ninth Circuit decision that read § 330(a) as placing fee-defense compensation "within the bankruptcy court's discretion to award fees for 'reasonable and necessary work.'" App., *infra*, 16a-17a (quoting *In re Smith*, 317 F.3d 918, 929 (9th Cir. 2002)). But it endorsed an Eleventh Circuit decision—albeit one decided under a materially different prior version of § 330(a)—as "more closely reflecting the statute's plain meaning." *Ibid.* (citing *Grant* v. *George Schumann Tire & Batt. Co.*, 908 F.2d 874, 882-883 (11th Cir. 1990)).

The court acknowledged that other areas of the law commonly allow fee-defense compensation. "In bankruptcy," it postulated, "the equities are quite different." App., *infra*, 17a. And "requiring professionals to defend their fee applications as a cost of doing business is consistent with the reality of the bankruptcy process." *Id.* at 17a-18a. Thus, it invoked the default "American Rule that each party to litigation bears its own costs." *Id.* at 17a, 19a-20a. True, it agreed, Congress wrote a "comparability factor" into § 330(a) to avoid "a professional firm's compensation [being] unfairly diluted below what comparably skilled practitioners receive in non-bankruptcy case. * * * The Bankruptcy Code plainly intended to * * * raise [bankruptcy] professional fees." *Id.* at 18a. Nonetheless, a parity argument, even in the face of

an admittedly "drastic reduction in absolute terms," was "difficult to analyze," and so parity was deemed met whenever *pre-dilution* "hourly rates" were "comparable" to non-bankruptcy rates. *Id.* at 18a-19a.

The court finally turned to policy considerations, proclaiming that "[t]he perverse incentives that could arise from paying the bankruptcy professionals to engage in satellite fee litigation are easy to imagine." App., *infra*, 18a. It discounted the bankruptcy court's countervailing policy argument that, without compensation for defending fees, "there will be an incentive for parties in interest, any of which can object to professional fees, to 'mount objections to extract a fee reduction,'" which, "in turn, might discourage competent counsel from handling bankruptcy cases." *Id.* at 20a (quoting *id.* at 138a). The Fifth Circuit did not reject this point as unreasonable, but found that allowing defense fees at all could incentivize exorbitant litigation. *Id.* at 21a. Nor did it assert that this concern has come to pass in the Ninth Circuit or other jurisdictions that have long left fee-defense compensation within the bankruptcy courts' discretion.

REASONS FOR GRANTING THE PETITION

This case provides as clean a vehicle as imaginable to resolve the pure question of law presented here. It turns on no factbound issues, but solely on whether bankruptcy judges *ever* have discretion to award bankruptcy professionals compensation for successfully defending applications for core fees. That question divides the circuits and is of substantial practical importance. The Fifth Circuit's construction of § 330(a) contravenes the provision's text and purpose and invites negative consequences.

I. THE FIFTH CIRCUIT'S JUDGMENT DIVIDES THE CIRCUITS ABOUT AN IMPORTANT QUESTION OF LAW

The Fifth and the Ninth Circuits—two of the largest for Chapter 11 bankruptcies—have squarely divided over

whether bankruptcy professionals' defense of core-fee applications may ever be compensated under § 330(a). This case presents a binary and outcome-dispositive question—either such fees are always barred as a matter of law, or they are not.

A. The courts are divided

1. *Statutory background*

Ensuring compensation parity between bankruptcy and non-bankruptcy practitioners was a central objective of the Bankruptcy Code of 1978. See Springer, Damned If You Do, Damned If You Don't—Current Issues for Professionals Seeking Compensation in Bankruptcy Cases Under 11 U.S.C. § 330, 87 Am. Bankr. L.J. 525, 529 (2013). Until then, bankruptcy practitioners labored under a compensation regime predicated not on parity, but on subordinating their compensation to the "economy of the estate." The old Bankruptcy Act's policy required bankruptcy attorneys "to be paid * * * appreciably less than [they] could command for similar services" outside of bankruptcy. *Jacobowitz* v. *Double Seven Corp.*, 378 F.2d 405, 407 (9th Cir. 1967).

In enacting the 1978 Code, Congress affirmatively altered that policy so as to forestall the attendant risk of driving the most qualified counsel from bankruptcy practice. "Bankruptcy specialists," it recognized, "if required to accept fees in all their cases that are consistently lower than fees they would receive elsewhere, will not remain in the bankruptcy field." See H.R. Rep. No. 95-595, at 330 (1977). It therefore "instructed" bankruptcy courts "to level the compensation with [that of] non-bankruptcy attorneys." Springer, *supra*, at 529. The Code authorized "reasonable compensation for actual, necessary services," and mandated that, in fixing such compensation, courts consider "the cost of comparable services other than in a case under this title." 11 U.S.C. § 330(a)(1)

(1982). See also 3 Collier on Bankruptcy ¶¶ 330.03[3], 330.03[12], 330.LH[3] (16th ed. 2013) (hereinafter Collier) (discussing how the Code "abandoned" the "spirit of economy" principle).

Yet the Code provided little specific guidance to achieve this important policy shift, such as how to determine which services to compensate and in what way. Various compensation issues inevitably divided courts; some embraced the parity principle and others honored it in the breach. For example, whether the preparation of a fee application was compensable generated division. See Collier ¶ 330.03[16][a][i]; Springer, *supra*, at 530. Fee applications are highly formalized, labor-intensive efforts that far exceed merely recording time and sending an invoice. See App., *infra*, 17a. Some courts believed that such compensation-focused activities could not be a "benefit to the estate," particularly where the estate had terminated and no longer existed. Others found that a categorical denial of such fees violated the Code's text and its parity policy by diluting a nominally equal fee through time-consuming but Code-mandated tasks.

Congress responded by clarifying its commitment to the parity and non-dilution principle. In 1994, it amended § 330(a), rejecting the unduly narrow constructions of some courts and providing more detailed guidance. See Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994). Because parity and non-dilution were impossible if services uniquely required by the bankruptcy process were deemed non-compensable, Congress expressly expanded the compensation standard from services with direct "benefit to the estate" to include services that "were necessary to the administration of * * * a *case* under [the Bankruptcy Code]" or that were "beneficial at the time at which the service was rendered toward the completion of" such a "*case*." § 330(a)(3)(C) (emphasis added). Thus, "benefit[ing] the estate" was no longer

the *sine qua non* of compensability.

Likewise, showing by negative implication the breadth of services that are in fact compensable, Congress for the first time enumerated situations where compensation was expressly *disallowed*—duplicative services and services that were neither "reasonably likely to benefit the debtor's estate" nor "necessary to the administration of the case." § 330(a)(4). And, referencing compensation for the "preparation" of a fee application, it mandated a particular method for setting that single service's compensation. § 330(a)(6).

Against this backdrop, all now agree that *preparing* fee applications is compensable. But the judgment below has again divided the courts of appeals, this time about whether professionals may ever be compensated for successfully *defending* those applications.

2. *Ninth Circuit case law enforced Congress's parity principle*

In cases that paralleled the increasing statutory emphasis on parity, the Ninth Circuit developed a jurisprudence supporting the discretion of bankruptcy judges to award fees for essential services—including the successful defense of fee applications.

a. The Ninth Circuit first addressed, under the pre-1994 version of § 330(a), whether professionals could be "compensat[ed] for time devoted to the preparation and presentation of [their] fee applications." *In re Nucorp Energy, Inc.*, 764 F.2d 655, 656 (9th Cir. 1985). Even in the era when compensation was tethered to "benefit[ing] the estate," *Nucorp* rejected as "unpersuasive the * * * suggestion that time devoted to the preparation of attorneys' fee applications is not compensable because such services benefit only the law firm and not the estate." *Id.* at 659. The court found that these "statutorily required" services were not only uniquely burdensome but were

necessary precisely because the Code itself demanded them. *Ibid.*

The Ninth Circuit examined non-bankruptcy contexts where fees are likewise "expressly provided for by statute." *Nucorp*, 764 F.2d at 659. In such contexts, "time devoted *to litigating the propriety of the fee award* is compensable," in part because "[i]t would be inconsistent to dilute an award of fees by refusing to compensate an attorney for time spent to establish a reasonable fee." *Id.* at 660 (emphasis added; internal citations and quotations omitted). "Were we to affirm" the denial of fees, it concluded, "we would, in effect, be reducing the fees that bankruptcy counsel may earn to a level that fails to provide full compensation for their services." *Id.* at 662.

b. The Ninth Circuit later clarified in *In re Riverside-Linden Investment Co.* that, when fee applications are deficient, § 330(a) does not require compensation for defense fees. 945 F.2d 320, 323 (9th Cir. 1991) (affirming bankruptcy court's denial of fees for a failed defense). *Riverside-Linden*, linked with *Nucorp*, reinforced bankruptcy courts' affirmative duty to exercise sound discretion in advancing the Code's parity policy.

c. The Ninth Circuit squarely resolved the issue of compensation for *successful* fee defenses under the current statute—the issue presented in this case—in *In re Smith*, 317 F.3d 918 (9th Cir. 2002) (abrogated in part on other grounds by *Lamie* v. *U.S. Trustee*, 540 U.S. 526, 531-539 (2004)). There, the court analyzed the clarified text of post-1994 § 330(a) and reaffirmed *Nucorp*'s analysis, holding that the Code's text and policy embraced defense fees under appropriate circumstances.

Like this case, *Smith* involved unjustified objections to core fees that the bankruptcy court roundly rejected. 317 F.3d at 921, 922. And, as here, Smith did "not challenge the reasonableness of the amount of the [defense]

fee awards, but rather the legal basis for the awards." *Id.* at 922, 923, 927. The only issue in both cases was whether courts may assess defense fees at all.

On that legal question, *Smith* reiterated its loyalty to the statute's parity principle and held that bankruptcy courts have discretion to award defense fees. "To deny [counsel] reasonable compensation for *successfully* defending its fee awards would dilute its compensation for 'actual and necessary services.'" *Smith*, 317 F.3d at 929. Whether to grant defense fees, and at what amount, "depends on the circumstances and is largely a matter within the informed discretion of the bankruptcy court." *Ibid.* The court of appeals affirmed the bankruptcy court's award of defense fees in *Smith* as a reasonable exercise of discretion. *Id.* at 929-931.

d. The Ninth Circuit subsequently reaffirmed the "common sense principles of *Nucorp*, *Smith*, and *Riverside-Linden* * * * " *In re Wind N' Wave*, 509 F.3d 938, 945 (9th Cir. 2007). There, the bankruptcy appellate panel reversed the bankruptcy court's refusal to award core fees, yet denied compensation for successfully defending those fees. *Id.* at 941. The court of appeals reversed.

It first gave a detailed explanation of § 330(a)'s parity and anti-dilution principle. The Code, it reiterated, was framed with the "intent to avoid dilution of the effective rate for bankruptcy counsel that would result if fees incurred in successfully obtaining or defending an award were not compensated." 509 F.3d at 945. It thus concluded that the availability of compensation for successful defenses "is necessary to prevent the dilution that would result if * * * attorneys were forced to absorb the time devoted to successfully litigating a fee award—an outcome that would be contrary to Congressional intent against fee award dilution." *Id.* at 945-946.

Wind N' Wave also repeated that courts must ensure

that fee-defense litigation is "necessary" under § 330(a)(1). The *Wind N' Wave* litigation, as in *Smith*, was "necessary because * * * the attorneys * * * did not frivolously appeal the lower court's decision merely to acquire litigation fees." 509 F.3d at 946. The Ninth Circuit's practice of compensating only necessary and successful defenses, therefore, functions as a built-in disincentive to running up the tab on meritless demands, while simultaneously discouraging wasteful, baseless fee challenges.

3. *The Fifth Circuit's holding conflicts with the Ninth Circuit's legal standard*

a. The judgment below has created an irreconcilable circuit conflict over § 330(a)'s proper scope. Justifiable defense fees under § 330(a) are available in the Ninth Circuit, but the Fifth Circuit flatly held that "Section 330(a) does not authorize compensation for the costs counsel or professionals bear to defend their fee applications." App., *infra*, 14a.

The Fifth Circuit recognized that the Ninth Circuit in *Smith* "ultimately held that such compensation rests within the bankruptcy court's discretion to award fees for 'reasonable and necessary' work." App., *infra*, 16a. But the Fifth Circuit disagreed, interpreting § 330(a) instead to categorically deny bankruptcy courts such discretion: "Section 330 is not fairly read to include 'fees for defense of fees' either as reasonable, necessary costs of case administration or to prevent dilution of the professional firm's core fees." *Id.* at 20a.

The Fifth Circuit's ultimate conclusion does not merely conflict with the Ninth Circuit's. Its entire opinion systematically rejects each textual and policy argument embodied in Ninth Circuit case law. Specifically, the Fifth Circuit:

- Held that defending fee applications never benefits the estate. App., *infra*, 15a-16a. Cf. *Smith*,

317 F.3d at 929 (successful fee defense "provided a benefit to the debtor's estate in determining the amount of the administrative fees that the estate owed").

- Rejected the Ninth Circuit's reasoning that "because resolving professional fees is required to close a case, their litigation is a reasonable and necessary aspect of estate administration." App., *infra*, 16a (citing *Smith*, 317 F.3d at 929).
- Dismissed the analogy to availability of defense fees under other fee-shifting statutes. App., *infra*, 17a-18a. Cf. *Nucorp*, 764 F.2d at 659-660.
- Rejected the Ninth Circuit's observation that categorically denying defense fees dilutes bankruptcy compensation relative to non-bankruptcy compensation—or at least that it materially does so. App., *infra*, 18a-19a. Cf. *Smith*, 317 F.3d at 928, 929.
- Rejected the prognosis that denying defense fees will incentivize meritless objections to extract fee reductions. App., *infra*, 20a-21a. Cf. *Smith*, 317 F.3d at 929.

The split could not be starker. Defense fees are never available in the Fifth Circuit as a matter of law; within the Ninth Circuit, courts have discretion to award them when deemed reasonable and necessary.

b. The Fifth Circuit contended that it did not *create*, but only deepened, a split. "The Eleventh Circuit," it said, "adopted [the same] interpretation in a factually similar case * * * ." App., *infra*, 15a (citing *Grant* v. *George Schumann Tire & Batt. Co.*, 908 F.2d 874, 882-883 (11th Cir. 1990)). Even if so, that would only expand the circuit division. Nor does *Grant* provide any cover for the Fifth Circuit.

First, far from being "factually similar," *Grant*'s facts

are markedly different. The court there faulted the fee applicant for an "appalling waste of time and resources," which flowed from "a breakdown in the chain of responsibility * * * from the district court through the bankruptcy court to the trustee and his attorney." 908 F.2d at 884. Unlike Baker Botts, counsel in *Grant* received only a small portion of the core fees requested, and the Eleventh Circuit chastised him and the trustee for their "abuses." *Ibid.*

The Fifth Circuit provided none of this context before declaring this case "factually similar" to *Grant*. App., *infra*, 15a. But its quotation from *Grant*—that "'[t]he appeals brought absolutely no benefit to the estate, the creditors, or the debtor,'" *ibid.* (quoting 908 F.2d at 882-883)—inescapably depends on that context. The Ninth Circuit could have made the same statement; *no* court awards defense fees when professionals are wasteful or abusive. *Grant* had no occasion to address whether fee litigation under *any* circumstances could *ever* benefit an estate.

Second, *Grant* (unlike *Smith*) preceded the 1994 amendments. The Fifth Circuit's purported "agree[ment] with *Grant*'s view as more closely reflecting the statute's plain meaning," App., *infra*, 16a, would be more plausible had the statute not substantially changed.

It is, therefore, hardly surprising that after the 1994 amendments, no court within the Eleventh Circuit appears to have cited *Grant* as prohibiting fee-defense compensation. If *Grant* is relevant at all, its role in the circuit split is, at best, ambiguous. And *even if* it arguably supports the Fifth Circuit's holding, that only underscores that the division is even deeper, and the need for this Court's guidance all the more imperative.

4. *Most lower courts have rejected the Fifth Circuit's categorical prohibition*

Courts and scholars recognize the conflict among lower courts on the question of law presented here. See Collier ¶ 330.03[16][a][ii]. The Fifth Circuit agreed that "[c]ase law addressing this question is divided." App., *infra*, 14a; see also, *e.g.*, *In re Worldwide Direct Inc.*, 334 B.R. 108, 111 (D. Del. 2005) (noting the conflict while rejecting construction later adopted by the Fifth Circuit).

The conflict is lopsided. As the district court observed below, "[t]he vast majority of courts find that compensating bankruptcy lawyers for the preparation of and the successful defense of their fee applications is necessary to avoid unfair dilution of their fees." App., *infra*, 46a. Only "[a] minority of courts generally deny all defense costs incurred defending fee applications based on the so-called 'American Rule,' as well as the same competing policy goals pre-dating the 1994 Amendments." Springer, *supra*, at 540.

Almost one-third of the 94 bankruptcy courts have considered this issue.[5] Many cases have exercised discretion to award fees for successful defenses.[6] When courts deny defense fees, it is ordinarily a matter of *discretion*, not because of perceived legal *preclusion*. Thus, even fee denials typically are consistent with the Ninth Circuit's approach, not the Fifth Circuit's. For instance, courts readily deny defense fees when the fee-application defense was unsuccessful or for some other reason did not

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[5] Other courts have addressed the issue in orders that are not readily available in online databases.

[6] At least thirty-six cases from twenty-nine courts in ten different circuits have acknowledged bankruptcy courts' discretion to award compensation for successful fee defenses. Many are cited in this petition; Appendix G, *infra*, contains petitioners' complete current list.

warrant compensation.[7] Even courts that initially appear to embrace the Fifth Circuit's rule have granted defense fees in subsequent cases.[8] Only two bankruptcy courts—in the Northern District of Texas and Western District of New York—consistently deny defense fees as a matter of law after 1994.[9] And, so far as petitioners are aware, the Northern District of Texas bankruptcy court alone has denied defense fees when, as here, creditors received 100 cents on the dollar.[10]

B. The issue is important and recurring and arises in an especially good vehicle

1. *Fee assessment is central to bankruptcy*

The circuit split about fee-defense compensation creates disorder in routine bankruptcy practice. Core-fee

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[7] See, *e.g.*, *In re Wireless Telecomms. Inc.*, 449 B.R. 228, 238 (Bankr. M.D. Pa. 2011) (denying compensation for defense fees because court could articulate "no benefit to the estate or necessity as it relates to the unsecured creditors"); *In re Erewhon, Inc.*, 21 B.R. 79, 89-90 (Bankr. D. Mass. 1982) (denying compensation for "time spent by counsel seeking to justify its own request for an excessive fee").

[8] Compare, *e.g.*, *In re Brous*, 370 B.R. 563, 572 (Bankr. S.D.N.Y. 2007) (citing the American Rule for an apparently *per se* prohibition of defense fees), and *In re New Boston Coke Corp.*, 299 B.R. 432, 443 (Bankr. E.D. Mich. 2003) (similar), with *In re Quigley Co., Inc.*, 500 B.R. 347, 366 (Bankr. S.D.N.Y. 2013) (awarding defense fees); *In re CCT Commc'ns, Inc.*, 07-10210 SMB, 2010 WL 3386947 (Bankr. S.D.N.Y. Aug. 24, 2010) (citing the non-dilution principle when awarding defense fees), and *In re Moss*, 320 B.R. 143, 160 (Bankr. E.D. Mich. 2005) (awarding defense fees).

[9] See, *e.g.*, *In re Teraforce Tech. Corp.*, 347 B.R. 838, 867 (Bankr. N.D. Tex. 2006); *In re St. Rita's Assocs. Private Placement, L.P.*, 260 B.R. 650, 652 (Bankr. W.D.N.Y. 2001). A few courts have categorically denied fees for both preparation and defense of fee applications, see App. G, *infra*, an indefensible position after the 1994 amendments.

[10] See *Frazin* v. *Haynes & Boone LLP*, 413 B.R. 378, 407 (Bankr. N.D. Tex. 2009), aff'd in part and rev'd in part on other grounds, 732 F.3d 313 (5th Cir. 2013).

litigation—the defense of a fee application—is common. The bankruptcy estate's professionals are required to publicly file a fee application. Fed. R. Bankr. P. 2016. Any party in interest may object. See Collier ¶330.08[2][b][ii] (listing eight possible parties in interest who might challenge a fee award). The defense of fees is thus a potential issue in *every* bankruptcy case involving estate-paid professionals.

The importance of uniformity is magnified by the risk of distorting § 330(a)'s "unambiguous policy" of parity, *i.e.*, "'that professionals and para-professionals in bankruptcy cases should earn the same income as their non-bankruptcy counterparts.'" *Worldwide*, 334 B.R. at 111 (quoting *In re Busy Beaver Bldg. Ctrs. Inc.*, 19 F.3d 833, 849 (3d Cir. 1994)). Yet lawyers in Texas, Louisiana, and Mississippi now necessarily earn less than their intra-circuit non-bankruptcy colleagues *and* their bankruptcy counterparts in other circuits.

The Fifth Circuit's rule permits disgruntled litigants or creditors to raise fee-application objections risk-free. It required little effort for Reorganized ASARCO to demand *every* written and electronic document that Baker Botts' 695 timekeepers had generated in this massive, four-year bankruptcy case; but it took 2,440 man-hours to comply with that demand. Nor did Reorganized ASARCO inconvenience itself once Baker Botts complied; it sent only two lawyers to review the documents for a combined total of five days, and they copied only 1% of the demanded material. In the Ninth Circuit and most other courts, by contrast, Reorganized ASARCO would have borne the cost of its onerous and pointless discovery request once Baker Botts prevailed. The Fifth Circuit rule misaligns the risks. It was not idle speculation when the bankruptcy court below warned that "[d]enying fees incurred in defending fee applications would provide an incentive for parties in interest to mount objections to

extract a fee reduction." App., *infra*, 138a.

2. *The issue affects all professionals*

The Fifth Circuit's decision affects the entire bankruptcy system, not just lawyers. All estate-paid professional fees are regulated by the bankruptcy court even when there is no challenge to the fee request. Any application can draw objections, and a defense must then be mounted. Collier ¶ 330.08[2][b][ii]. Challenges to trustees' and accountants' fees are common. See, *e.g.*, *In re Chavez*, 157 B.R. 30, 33 (D. Colo. 1993), aff'd, 13 F.3d 404 (10th Cir. 1993) (affirming defense fees to trustee); *In re Geneva Steel Co.*, 258 B.R. 799, 802 (Bankr. D. Utah 2001) (awarding defense fees to accounting firm).

Nor is the judgment below limited to large bankruptcies or firms. Baker Botts was awarded $5 million for defense fees, and a bit more for expenses, causing dilution of about 4.4%. That amount is large in absolute, but less so in relative, terms; more commonly, defense fees will be smaller in absolute, but considerably larger in relative, terms. For example, in *Smith*, defense fees were about 25% of core fees. 317 F.3d at 922 (firm "recovered approximately $175,000" in core fees and over $47,000 in defense fees and costs). See also, *e.g.*, *In re Walters*, No. BKR-04-06902-JM7, 2006 WL 6589027 at *7-8 (Bankr. S.D. Cal. May 30, 2006) (fee-defense award equaling 27% of core fees). After all, objections may require substantial defense efforts even for small core-fee awards. Courts would not accept a formal 25% reduction in bankruptcy professionals' compensation vis-à-vis non-bankruptcy lawyers. But the Fifth Circuit effectively achieves this result through automatic denial of fees for successfully defending fee applications against meritless attacks.

3. *This case is an especially good vehicle*

The Fifth Circuit's categorical holding barring defense fees is an outcome-dispositive construction of § 330(a).

No court below—bankruptcy, district, or court of appeals—expressed any doubt that, if defense fees are *ever* authorized, then they are merited here. No party disputed the amount of defense fees. All that is at issue here is whether § 330(a) ever permits discretion to award defense fees.

The split is equally clear. Two appellate courts (or, perhaps three, depending on one's view of *Grant*) with especially heavy bankruptcy dockets have made matter-of-law rulings, which reflects ample conflict for this Court's review.[11] It is not uncommon for this Court to resolve a 1-1 bankruptcy split, as it did just this past Term in *Clark* v. *Rameker*, 573 U.S. __ (2014) (slip op. at 4) ("We granted certiorari to resolve a conflict between the Seventh Circuit's ruling and the Fifth Circuit's [prior] decision * * * "). It should do so here.

II. The Judgment Below Is Wrong And Should Be Reversed

The Fifth Circuit's construction of § 330(a) violates the provision's text, history, and essential purpose. Moreover, despite the court's policy claims, its holding invites undesirable consequences that Congress sought to avoid.

A. Section 330(a)'s text includes discretion to award compensation for defending fee applications

Multiple features of § 330(a)'s text demonstrate that the statute permits fee-defense compensation.

1. *The statute grants broad discretion to award "reasonable compensation"*

Congress could have limited bankruptcy professionals'

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[11] According to annual statistics published by the Administrative Office of the U.S. Courts, the Fifth, Ninth, and Eleventh Circuits are three of the five busiest for Chapter 11 cases, collectively accounting for nearly half of such filings in 2013, with the Ninth Circuit alone exceeding 25%.

compensation to tasks expressly enumerated by statute. It instead gave bankruptcy judges wide latitude to determine and award "reasonable compensation for actual, necessary services" performed by a professional. § 330(a)(1)(A); see *ASARCO, L.L.C.* v. *Barclays Capital, Inc.*, 702 F.3d 250, 260 (5th Cir. 2012) ("broad discretion"). The structure of § 330(a) implements this generous grant of authority:

- *Broad discretion.* Courts must "tak[e] into account all relevant factors, including," but not limited to, six factors that Congress specified. § 330(a)(3).
- *Minimal express limits on discretion.* Courts' consideration of those factors is limited for just one kind of service: "Any compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application." § 330(a)(6).
- *Minimal exclusion from compensability.* Rather than listing services that *can* be compensated, § 330(a)(4) enumerates two circumstances in which they *cannot*: (1) "unnecessary duplication of services" and (2) services that were neither "reasonably likely to benefit the debtor's estate" nor "necessary to the administration of the case." § 330(a)(4).

These provisions form a practical regime in which, subject to multiple stages of appellate review, bankruptcy judges who supervise cases must exercise sound discretion in ordering fees.

Further textual indications of broad discretion abound. One enumerated factor, for instance, clarifies Congress's view that services supporting "the administration of * * * a *case*," or that are "beneficial * * * toward the completion of [such] a *case*," are compensable. § 330(a)(3)(C) (emphases added). The textual focus on the "case," rather than the pre-1994 focus on the "es-

tate," demonstrates a conscious decision to eliminate textual barriers to full compensation for services that contribute to the case, but may not directly benefit the estate.

Likewise, § 330(a)(4)'s exclusion of compensability for *some* services indicates Congress's ability to expressly limit the otherwise-broad scope when it so desires. Tellingly, the restrictions in § 330(a)(4) largely track § 330(a)(1) itself. It is hard to imagine many services falling within subsection (a)(1) yet denied compensability solely because of subsection (a)(4). Congress believed it worthwhile to make such exclusions unmistakably clear, and it both could and would have expressly enacted the Fifth Circuit's categorical ban if it had wished to do so. It is implausible, absent such express direction, to assume that Congress nonetheless intended to deny compensability in the common situation of fee defenses, which fall comfortably within (a)(1)'s authorization and outside (a)(4)'s exclusions.

2. *Fee defense is "necessary" for case administration and beneficial to the estate*

Despite the textual indications of statutory breadth, the Fifth Circuit believed that fee-application defenses categorically fall within § 330(a)(4)(A)(ii)'s prohibition. It correctly explained that professional services "are compensable only if they are likely to benefit a debtor's estate *or* are necessary to case administration." App., *infra*, 15a (emphasis added). But it wrongly concluded, with little explanation, that defending fee applications never qualifies under either prong.

a. Most courts, however, readily appreciate how the defense of fee applications can benefit an estate. For instance, administrative-expenses priority must be established, see § 503(b)(2); additionally, any objections to fee applications further generate unavoidable defense work. Thus, one court recently observed that the "estate has an

interest in obtaining a just determination of the amount it should pay its professionals." *In re First State Bancorp.*, No. 7-11-11916-JA, 2014 WL 1203141, at *2 n.10 (Bankr. D.N.M. Mar. 24, 2014). Such work is "necessary and beneficial to the bankruptcy system as a whole, and indirectly, to each estate participating in the system." *Boyd* v. *Engman*, 404 B.R. 467, 483 (W.D. Mich. 2009). Accord *Smith*, 317 F.3d at 927, 928-929, 930.

b. With the 1994 amendments, it became all the more evident that defending fee applications against objections is "beneficial * * * toward the completion of" a bankruptcy "case." § 330(a)(3)(C). No case can be "complet[ed]" until the bankruptcy court makes an order allocating compensation, which requires considering *both* a fee application *and* any objections. Without this fee-related litigation, as the district court below explained, "the bankruptcy case cannot be put to bed." App., *infra*, 47a; accord *id.* at 110a-111a (bankruptcy court's similar observation).

In short, fee-defense litigation is necessary to a case's completion because it is an indivisible part of a complex fee-assessment process that the Code specifically mandates. As the Ninth Circuit observed, such litigation often satisfies *both* § 330(a)(3)(C) factors—that it is "necessary for the administration of the case *and* provide[s] a benefit to the debtor's estate in determining the amount of administrative fees that the estate owed." *Smith*, 317 F.3d at 928-929 (emphasis added).

3. *Preparation and defense serve the same function*

The compensability of fee-application preparation is undisputed. With respect to the only variable that matters—how it benefits the estate or the case's administration—preparation and defense are indistinguishable. It thus follows that the latter is equally entitled to compen-

sation.

a. To the Fifth Circuit, however, § 330(a)(6)'s reference to fee applications, but not fee defense, supports categorically excluding fee-defense compensation. App., *infra*, 16a. But § 330(a)(6) is not a textual grant, much less an implicit denial, of authority. It does not determine whether, but *how much*, to compensate for preparation: "Any compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application." § 330(a)(6). *If* compensation is awarded for preparation, this specific metric must be used. But fee-application preparation, like every other compensable service, must be authorized by § 330(a)(1) and not be precluded by § 330(a)(4). Section 330(a)(6) merely eliminates any possible doubt that preparation can survive those requirements, and provides a metric for setting fee-preparation compensation.

That conclusion makes it easier, not harder, to justify fee-defense compensation. Whether services are "necessary" or "beneficial" under § 330(a)(1) and (a)(4) are inherently functional questions, and there is no functional distinction between the utility of a fee application's preparation and its reasoned defense. Both equally contribute to the ultimate resolution of an accurate allocation of payments. A well-grounded defense is "part and parcel" of the administration of the estate. *Boyd*, 404 B.R. at 482-483. The Fifth Circuit itself acknowledged the point: "Implicit in" the "procedure" for assessing bankruptcy fees "is the possibility of fee litigation." App., *infra*, 15a. A successful defense is certainly no less beneficial to the estate or the administration of the case than the initial application. The "case" cannot be finally closed without all objections to the application being resolved.

The only statutory distinction between preparation and defense is the method for computing the *amount* of compensation. That has nothing to do with *compensabil-*

ity itself. And it is a distinction not between preparation and defense, but between preparation and *every other kind of service*. Fee preparation alone has a uniquely specified method for assessment, § 330(a)(6), whereas all other assessments are subject only to § 330(a)(3). This is not especially surprising. The Fifth Circuit noted that § 330(a)(6)'s requirement of "tailoring the award [for preparing an application] to the 'level and skill reasonably required to prepare the application' emphasizes scrivener's skills over other professional work." App., *infra*, 15a-16a. Exactly—while *preparing* an application may justifiably limit compensation to the use of "scrivener's skills," *defending* it does not, because defense is the sort of litigation service that § 330(a)(3)'s general provisions adequately address.

b. The Fifth Circuit also sought to discredit defense fees by contending that "[t]he primary beneficiary of a professional fee application, of course, is the professional." App., *infra*, 15a. Believing that compensability was affected by the unremarkable point that "the debtor's estate, and therefore normally the creditors, bear the cost," it concluded that "fees for defense of a fee application are not compensable from the debtor's estate." *Ibid.*

That nontextual rationale is deeply flawed. It ignores that the 1994 amendments compensate work that benefits the administration and completion of "the case," regardless of who is the primary beneficiary. And it "proves too much," as the District of Delaware observed in rejecting the same logic about the professional being the "primary beneficiary," because

> [b]y definition, every fee petition is for the benefit of the petitioning professional. It is not that the professional benefits that is of consequence; *what matters is whether the professional's obtaining of reasonable compensation is also a benefit to the estate.*

Worldwide, 334 B.R. at 111-112 (emphasis added). Moreover, the Fifth Circuit's critique applies equally to a fee application's preparation as to its defense, a sure sign it is not interpretively sound.

c. Finally, the Fifth Circuit invoked the "American Rule." See App., *infra*, 19a-20a. That default principle requires parties to bear their own fees, but is inapplicable here because the Code displaces it.

Comprehensive statutory fee-determination regimes are not governed by the American Rule because "[t]he American rule is merely a default rule; it is often changed by statute." *J.R. Cousin Indus., Inc.* v. *Menard, Inc.*, 127 F.3d 580, 583 (7th Cir. 1997). The whole point of § 330(a) is to thoroughly regulate bankruptcy fees, leaving no vacuum for the default to fill. This Court has recognized that even the Bankruptcy Act of 1898 departed from the American Rule. See *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 260 n.33 (1975). The Fifth Circuit observed that "the Bankruptcy Act's compensation provision was significantly reworked by the more elaborate framework of Section 330," App., *infra*, 20a—but that is *more* reason, not less, to find that statutory text has displaced the American Rule.

The statutory discretion to award "reasonable compensation" that Congress afforded bankruptcy judges in § 330(a) displaces the American Rule, not the other way around.

B. Congressional purposes, as reflected in the text and history of the Code, support compensability for successful fee defenses

The parity and non-dilution purpose of § 330(a) has been addressed at length. It is reinforced by the statutory text, especially after the 1994 amendments. The judgment below thwarts Congress's clear purpose.

1. To effectuate its goal, Congress mandated consid-

eration of "the customary compensation charged by comparably skilled practitioners in cases other than cases under this title." § 330(a)(3)(F). This statutory purpose is widely recognized. See, *e.g.*, *In re UNR Indus., Inc.*, 986 F.2d 207, 209 (7th Cir. 1993); *supra* Part I.A.1-2. The Fifth Circuit did not dispute that parity is an important statutory purpose or that the arithmetic consequence of categorical defense-fee denial is the dilution of core fees. App., *infra*, 18a. It instead sought to bypass the issue. Complaining that parity is "difficult to analyze," the court replaced it with a proxy under which parity is deemed satisfied whenever pre-dilution "hourly rates" are comparable. *Id.* at 18a-19a.

But that is not parity. Comparable hourly rates are merely a *starting point*—they are necessary, but not sufficient. Parity can evaporate through fee dilution caused by costs imposed uniquely in bankruptcy practice, which is effectively the same as openly permitting disparate hourly rates in the first place. "[R]equiring counsel who has successfully defended a fee claim to bear the costs of that defense *is no different than cutting counsel's rate.*" *Worldwide*, 334 B.R. at 112 (emphasis added).

There is, of course, no escaping dilution under the Fifth Circuit's rule. "If compensation is not permitted for fees incurred in defending a fee application, creditors" (or any objecting party, like Reorganized ASARCO) "could negotiate reductions in [core] fee awards knowing full well that the attorney is in a no-win situation. Even if the attorney prevails, he or she will in effect have financed the litigation without any hope of surviving it whole." *Worldwide*, 334 B.R. at 111 (citations and quotations omitted); accord *Smith*, 317 F.3d at 928 (categorical denial of defense fees "would dilute fee awards * * * reduc[ing] the effective compensation of bankruptcy attorneys to levels below the compensation available to attorneys generally").

By *ensuring* systematic dilution of bankruptcy fee awards whenever any objector so desires, the judgment below sets the Code at war with itself. While paying lip service to parity, the Fifth Circuit's version of § 330(a) implacably impedes it. It converts § 330(a) into the opposite of Congress's purpose—a tool to penalize Baker Botts for practicing in the bankruptcy area by diluting its core fees through bankruptcy-specific burdens.

2. The court of appeals sought to diminish the importance of § 330(a)'s anti-dilution principle by suggesting that it was no big deal here: "In this case, the huge cost of defending Baker Botts' core fees seems a drastic reduction in absolute terms, but it amounts to only about 4.4% of the core fee." App., *infra*, 18a-19a. The Fifth Circuit's approach is doubly wrong. It has no authority to cavalierly disregard categorical dilution of any amount (even if "only" 4.4%). But dilution through automatic defense-fee denial is especially threatening for professionals serving small bankruptcies. See *supra* Part I.B.2 (discussing how smaller bankruptcies easily could experience dilution of 25% or more). Given Congress's objectives, it would be perverse to adopt a rule that is especially burdensome on the bulk of smaller bankruptcies, which rarely involve the substantial amounts in this case.

3. The Fifth Circuit acknowledged that successful civil-rights plaintiffs are entitled to compensation for defending fee applications because this prevents fee dilution which would deprive litigants of qualified counsel. App., *infra*, 17a. But it failed to recognize that this exact concern prompted § 330(a)'s enactment. The court dismissed the analogy to civil-rights fee-defense practices because (it thought) bankruptcy, unlike civil-rights litigation, is often consensual, and "[n]o side wears the black hat for administrative fee purposes." *Ibid.* But contrary to the "black hat" implication, civil-rights fee awards are "not meant as a 'punishment' for 'bad' defendants" but

instead are "meant to compensate civil rights attorneys who bring civil rights cases and win them." *Williams* v. *Hanover Hous. Auth.*, 113 F.3d 1294, 1302 (1st Cir. 1997). Defense fees there, as in bankruptcy, prevent "dilut[ing] the fee award," *Cruz* v. *Hauck*, 762 F.2d 1230, 1234 (5th Cir. 1985) (civil-rights context). Nor is bankruptcy uniformly consensual; disputes that require litigation are no less adversarial in bankruptcy than elsewhere. This case proves as much. Even if bankruptcy sometimes is consensual, that hardly justifies the Fifth Circuit's blanket denial of fees when proceedings are not.

C. Policy concerns cut against the Fifth Circuit's categorical rule

1. Much of the Fifth Circuit's analysis is predicated on its concern that ordinarily "'almost everyone loses something'" in bankruptcy, and so sound policy requires minimizing costs to the estate at the expense of counsel. App., *infra*, 16a. But this analysis is a throwback to the era in which "economy of the estate" reigned supreme. See *supra* Part I.A.1. As discussed above, Congress has selected a different policy—one where preservation of the estate must coincide with ensuring competent representation. Congress surely knows that unsecured creditors are rarely made whole in bankruptcy, yet it still departed from the "economy of the estate" approach. If defense fees were nonetheless categorically excluded, Congress would surely have said so.

2. The Fifth Circuit's focus on "ordinary cases," App., *infra*, 17a, shows why its blanket rule is ill-advised—*this case* is hardly "ordinary." The Fifth Circuit acknowledged as much. *Id.* at 3a-4a, 9a, 12a-13a. Even if unsecured creditors' rights justified limiting (or even denying) defense fees in many cases, that concern cannot be invoked here—every creditor was paid in full, and Reorganized ASARCO shed the weighty environmental, tort, and labor liability it once faced. *Id.* at 3a.

Nothing justifies a *categorical* ban when there are cases like this one to which the Fifth Circuit's policy rationales simply do not apply. If other circumstances in other cases make defense fees inappropriate, that is why bankruptcy judges have discretion—and why there are three levels of further appeals (district, court of appeals, and this Court).[12]

3. The Fifth Circuit also thought that the incentive structure of § 330(a) justified categorically barring defense fees. "The perverse incentives that could arise from paying the bankruptcy professionals to engage in satellite fee litigation are easy to conceive." App., *infra*, 18a. If defense fees were awarded regardless of merit, it would indeed be easy to imagine a deluge of frivolous fee demands. But the Fifth Circuit attacked an imaginary rule; *no* court compensates meritless "satellite fee litigation." The solution is not to ban even unquestionably meritorious defense fees like Baker Botts', but to charge bankruptcy courts with separating the wheat from the chaff. Nothing suggests that the Ninth Circuit, which denies compensation for meritless and unnecessary fee defenses, has experienced an explosion of unjust fee demands and satellite litigation. Professionals there, and in other jurisdictions authorizing defense fees, are properly deterred from ginning up litigation.

The Fifth Circuit's approach, therefore, will prevent no "perverse incentives," App., *infra*, 18a; just the opposite, it *creates* perverse incentives to engage in meritless litigation. Categorically denying defense fees "would be to provide an unhealthy incentive for persons opposed to professional fees to mount spurious objections as a means

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[12] Similarly, the court's belief that there is sometimes a "conspiracy of silence" between fee applicants and potential objectors, App., *infra*, 20a, cannot support categorically denying defense fees in cases where the fee-application process was highly contentious.

of extracting fee reductions, rather than because the work done for the estate was genuinely not for the benefit of the estate." *Worldwide*, 334 B.R. at 112; accord *Smith*, 317 F.3d at 929. Reorganized ASARCO's conduct will be replicated and magnified now that objectors know that meritless objections will impose disproportionate cost on fee applicants. And professionals can be expected to surrender to demands for reduced core fees—and then often to exit the bankruptcy field, which is what Congress wished to avoid.

4. The court of appeals concluded by suggesting that, if objectors' conduct was truly egregious, it could be deterred via the threat of sanctions, including shifting attorney's fees. App., *infra*, 20a-21a. But this misses the point. While it is certainly true that if professionals can prove violations of Bankruptcy Rule 9011 (analogous to Federal Rule of Civil Procedure 11), then objectors would face sanctions that might include attorney's fees. That is true in any case. But lawyers can be savvy enough to avoid sanctions while nonetheless imposing unreasonable burdens that dilute core fees. While "sanctions provide some protection against harassment, a fee objection is a gambit easily veiled in a policy of economy." Springer, *supra*, at 539 n.101. Guaranteeing objectors a free ride so long as they do not cross the line into sanctionable conduct is an unmistakable invitation to abuse.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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July 2014

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 12-40997

IN THE MATTER OF: ASARCO, L.L.C.,
Debtor

ASARCO, L.L.C.,
Appellant

v.

JORDAN HYDEN WOMBLE CULBRETH & HOLZER, P.C.,
Appellee

Consolidated with
Case Nos. 12-40998 & 13-40409

IN THE MATTER OF: ASARCO, L.L.C.,
Debtor

ASARCO, L.L.C.,
Appellant

v.

BAKER BOTTS, L.L.P.,
Appellee

(April 30, 2014)

Appeals from the United States District Court
for the Southern District of Texas

Before STEWART, Chief Judge, and HIGGINBOTHAM and JONES, Circuit Judges.

EDITH H. JONES, Circuit Judge:

Baker Botts and Jordan, Hyden, Womble, Culbreth & Holzer, P.C. ("Jordan Hyden") served as debtor's counsel to ASARCO LLC ("ASARCO") during its Chapter 11 bankruptcy and helped ASARCO confirm a reorganization plan that paid all of its creditors in full. The firms were well compensated pursuant to 11 U.S.C. § 330(a) for their fees and expenses for representing ASARCO. What remains to be decided, however, are two fee-related issues: whether the bankruptcy court abused its discretion in authorizing a 20% premium to Baker Botts and 10% premium to Jordan Hyden for their unusually successful fraudulent transfer litigation; and whether the bankruptcy court was authorized, consistent with 11 U.S.C. § 330, to award attorneys' fees to the firms for defending their fee applications in court. We affirm the awards of fee enhancements but reverse the awards of fees for litigating the firms' fee applications.

I. Background

ASARCO is an integrated copper mining, smelting, and refining company.[1] ASARCO entered Chapter 11 bankruptcy in 2005 facing cash flow deficiencies, various environmental liabilities, and tax and labor problems. Two years before ASARCO commenced its bankruptcy case, its Parent company directed ASARCO to transfer a controlling interest in Southern Copper Corporation

[1] ASARCO LLC is owned by ASARCO Incorporated, which is owned by Americas Mining Corporation, which is in turn owned by Grupo Mexico (collectively, ASARCO's "Parent").

("SCC") to the Parent despite ASARCO's financial distress.

Baker Botts and Jordan Hyden successfully prosecuted complex fraudulent transfer claims to recover ASARCO's controlling interest in SCC (the "SCC Litigation"). The judgment against ASARCO's Parent, valued at between $7 and $10 billion, was the largest fraudulent transfer judgment in Chapter 11 history. After 52 months in bankruptcy, ASARCO emerged pursuant to a plan of reorganization in late 2009 (funded by its Parent as a result of the SCC Litigation) with little debt, $1.4 billion in cash, and the successful resolution of its environmental, asbestos and toxic tort claims.

In their final fee applications, Baker Botts and Jordan Hyden sought lodestar fees, expenses, a 20% fee enhancement for the entire case, and fees and expenses for preparing and litigating their final fee applications. ASARCO, now once again controlled by its Parent, challenged the fees on a large scale (a challenge that included a discovery request covering every document Baker Botts produced during the 52-month bankruptcy, resulting in the production of 2,350 boxes of hard copy documents and 189 GB of electronic data).[2] None of the objections to Bakers Botts's core fees were joined by the United States Trustee.

After a six-day fee trial, the bankruptcy court rejected all of ASARCO's objections to the core fee request and awarded more than $113 million to Baker Botts and $7 million to Jordan Hyden for core fees and expenses. Approving percentage fee enhancements only for the work they performed on the SCC Litigation (rather than, as requested, on the entire case), the court awarded Baker

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[2] ASARCO did not challenge Jordan Hyden's core fee application.

Botts an additional $4.1 million and Jordan Hyden over $125,000. The court's calculation was based on "rare and exceptional" performance and results in the adversary proceeding and a finding that the standard rates charged by Baker Botts were approximately 20% below the appropriate market rate. Finally, the court authorized fees and expenses for the firms' litigation in defense of their attorneys' fee claims, resulting in another $5 million (plus expenses) to Baker Botts and over $15,000 to Jordan Hyden.

On appeal to the district court, ASARCO abandoned its objections to the Baker Botts core fee award. The same judge who had presided over the SCC Litigation heard the appeal. The district court affirmed the fee enhancements, stating that "there is an abundance of evidence which supports [the bankruptcy] court's enhancement award A seven billion dollar judgment, which is recoverable, which saves a company, and funds a 100% recovery for all concerned is a once in a lifetime result." The district court agreed that Baker Botts's and Jordan Hyden's fees to defend their core fees were compensable, and it did not disturb the bankruptcy court's authorization to seek an award of appellate fees for the same purpose. Because the court also held that attorneys' fees were improperly awarded for Baker Botts's pursuit of its fee enhancement,[3] it remanded to the bankruptcy court to determine whether any of the firm's $5 million defense-fee award related to the enhancement.

On remand, the bankruptcy court concluded that all of the defense-fee award compensated Baker Botts for defending core fees incurred in connection with the case. On appeal, the district court affirmed the final award.

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[3] Baker Botts did not appeal this ruling.

The district court also held that the firms' appellate fees was permissible but premature. ASARCO has appealed.

II. Standard of Review

A bankruptcy court has "broad discretion" to determine reasonable attorneys' fees, as the "bankruptcy court is more familiar with the actual services performed and has a far better means of knowing what is just and reasonable than an appellate court can have." *In re Lawler*, 807 F.2d 1207, 1211 (5th Cir. 1987) (internal quotation marks and citation omitted). Accordingly, we disturb a fee award only if the bankruptcy court abused its discretion. *Id.* "An abuse of discretion occurs where the bankruptcy court (1) applies an improper legal standard or follows improper procedures in calculating the fee award, or (2) rests its decision on findings of fact that are clearly erroneous." *In re Cahill*, 428 F.3d 536, 539 (5th Cir. 2005) (citation omitted). Under the clear error standard, we disturb factual findings only if "left with a firm and definite conviction that the bankruptcy court made a mistake." *Id.* at 542 (internal quotation marks and citation omitted).

We review a "district court's decision by applying the same standard of review to the bankruptcy court's conclusions of law and findings of fact that the district court applied." *Id.* at 539 (citation omitted).

III. Discussion

A. Fee Enhancement

Section 330(a)(3) of the Bankruptcy Code provides a non-exclusive list of factors that bear on a court's determination of the reasonable compensation for actual, necessary services and expenses rendered by attorneys and other court-supervised bankruptcy professionals. *See* 11 U.S.C. § 330(a)(1)(A). Thus,

> [T]he court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
>
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

11 U.S.C. § 330(a)(3).

Elaborating on this provision, bankruptcy courts use the lodestar method, multiplying the number of hours of work performed by attorneys and paraprofessionals by the hourly rates of each. The total yields a lodestar amount. *In re Pilgrim's Pride Corp.*, 690 F.3d 650, 654–55 (5th Cir. 2012) (citing *Lawler*, 807 F.2d at 1211). "[A]fter calculating the lodestar, bankruptcy courts retain[ ] the discretion to adjust the lodestar upwards or downwards to reflect their consideration of the *Johnson* factors." *Id.*; *Johnson v. Ga. Highway Express, Inc.*, 488

F.2d 714, 717–19 (5th Cir. 1974). *See also* 11 U.S.C. § 330(a)(2). The twelve *Johnson* factors are:

> (1) The time and labor required; (2) The novelty and difficulty of the questions; (3) The skill requisite to perform the legal service properly; (4) The preclusion of other employment by the attorney due to acceptance of the case; (5) The customary fee; (6) Whether the fee is fixed or contingent; (7) Time limitations imposed by the client or other circumstances; (8) The amount involved and the *results obtained*; (9) The experience, reputation, and ability of the attorneys; (10) The "undesirability" of the case; (11) The nature and length of the professional relationship with the client; (12) Awards in similar cases.

Pilgrim's Pride, 690 F.3d at 654 (citations omitted) (emphasis added).

This court has clarified that Section 330(a), the lodestar method, and the *Johnson* factors work in conjunction with each other to guide the court's discretion. *Id.* at 656 (citing *Cahill*, 428 F.3d at 539–40). Because the four *Johnson* factors related to attorney skill and legal complexity are presumably fully reflected in the lodestar, those four factors can only form the basis for a fee enhancement in "rare and exceptional circumstances." *Id.* (citations omitted).

Although these general, well understood standards cover nearly all bankruptcy fee applications, the bankruptcy court here broke out of the usual lodestar mode by authorizing fee enhancements equal to 20% and 10%, respectively, of each firm's attorneys' fees for pursuing the SCC Litigation. ASARCO takes a swipe at arguing that bankruptcy fee enhancements are never allowable solely for extraordinary attorney performance and results obtained. More pointedly, ASARCO challenges the

lower courts' additional findings of fact and their degree of articulation of the basis for the additurs. We address each of appellant's arguments.

ASARCO argues that the Supreme Court decision in *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 130 S. Ct. 1662, 176 L. Ed. 2d 494 (2010) prohibits court awarded fee enhancements subject to only three exceptions, and that neither law firm's enhancement request satisfies any of the exceptions.[4] *Perdue* dealt with fee-shifting in civil rights cases. 42 U.S.C. § 1988. In *Pilgrim's Pride*, however, this court stated explicitly that *Perdue* did not overrule this circuit's bankruptcy precedent authorizing fee enhancements under other, albeit limited circumstances pursuant to Section 330(a). *Pilgrim's Pride*, 690 F.3d at 660–67. Nowhere does *Pilgrim's Pride* indicate that *Perdue* removes the discretion of bankruptcy courts to award a fee enhancement in rare and exceptional circumstances. The only relevant distinguishing factor that ASARCO points to is that in *Pilgrim's Pride* the debtor's board recommended paying the enhancement, while in this case ASARCO's board did not.[5] The Supreme Court in *Perdue* was greatly concerned with protecting the taxpayers who would fund any enhanced fees, 559 U.S. at 559, 130 S. Ct. at 1677, but this court in *Pilgrim's Pride*

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[4] The three exceptions are: (1) the hourly rate used for the lodestar does not adequately measure the attorneys' "true market value"; (2) the attorneys' performance included an "extraordinary outlay of expenses and the litigation is exceptionally protracted"; (3) the attorneys' performance involved an "exceptional delay in the payment of fees." *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 554–56, 130 S. Ct. 1662, 176 L. Ed. 2d 494 (2010).

[5] Before the Parent regained control of reorganized ASARCO, ASARCO's board voted to consent to an enhancement, but the board did not have the authority to approve payments exceeding $1 million without the Parent's approval and that approval was never granted.

rejected the Trustee's argument that the creditors would fund the enhanced fees in a similar fashion because the creditors were paid in full. 690 F.3d at 666. Here, too, the creditors have been or will be paid in full. The real difference, then, is that the Trustee here did not object and the debtor did not consent. That is an inconsequential distinction. *Pilgrim's Pride* is controlling in bankruptcy fee matters, at least where a reorganization plan pays creditors' claims in full.

ASARCO's contention that the judgment the firms achieved in the fraudulent transfer litigation was not "rare and exceptional" falls flat. In affirming the bankruptcy court's fee enhancement, the district court, which tried and rendered judgment in the SCC Litigation, stated that "there is an abundance of evidence which supports [the bankruptcy] court's enhancement award . . A seven billion dollar judgment, which is recoverable, which saves a company, and funds a 100% recovery for all concerned is a once in a lifetime result." We do not disagree with the lower courts' effusive evaluations of the results obtained.

Irrespective of exceptional results, ASARCO maintains that this court has never affirmed such a fee enhancement without some additional compelling factor. ASARCO argues, for instance, that the fees in *Pilgrim's Pride* were consented to, that the attorneys demonstrated exceptional efficiency, and that they had otherwise been compensated at below market rates. *See id.* at 653. The enhancement in *Rose Pass Mines* was also allegedly based on below market rates. *See Rose Pass Mines, Inc. v. Howard*, 615 F.2d 1088, 1092 (5th Cir. 1980). ASARCO further argues that the enhancement in *Lawler* was justified by a risk of non-payment. *See Lawler*, 807 F.2d at 1212–13. As discussed above, consent does not materially

distinguish *Pilgrim's Pride*, especially where that lack of consent issued from an adversary Parent. The court in *Pilgrim's Pride* did note how quickly Pilgrim's Pride emerged from bankruptcy, but immediately before doing so it observed that "[o]ne hundred percent dividend cases are rare in Chapter 11, and rarer still in large cases such as this." *Pilgrim's Pride*, 690 F.3d at 653. The *Rose Pass Mines* court pointed out that the hourly rate used to calculate the lodestar was at "the lower limit of fees customarily charged," but it also approved the bankruptcy court finding that the "unusually good result" was due to "excellent services" rendered by the attorneys. *Rose Pass Mines*, 615 F.2d at 1090, 1092 (internal quotation marks and alteration omitted). While this court reduced, but did not eliminate, the enhancement awarded in *Lawler* based on the bankruptcy court's finding that the fee was substantially contingent, it commended the attorneys as "well entitled under the application of the *Johnson* factors to an award significantly above the lodestar" based on "outstanding professional accomplishment in this case." *Lawler*, 807 F.2d at 1213. In none of the three cases did this court state that some "plus factor" beyond exceptional performance and results was required for a fee enhancement. Indeed, doing so would be unnecessarily redundant of the *Johnson* factors.

In further critique of the enhancements for the SCC Litigation, ASARCO challenges the bankruptcy court's finding that Baker Botts's rates were "below-market," a fact that reinforced the court's fee enhancement decision. The court, however, amply documented its finding by reference to Baker Botts's customary practices, the charges of competitive firms in Texas, and the charges by comparable firms when representing parties to Chapter 11 cases pending in Texas. Because this court, like the

Supreme Court, has not held that reasonable attorneys' fees in federal court have been "nationalized," the bankruptcy court's charts comparing general hourly rates of out-of-state firms and rates charged in cases pending in other circuits are not relevant. *Cf. Perdue*, 557 U.S. at 551 (the lodestar looks to "the prevailing market rates in the relevant community"); *McClain v. Lufkin Indust., Inc.*, 649 F.3d 374, 381 (5th Cir. 2011) (court can look to the market rate for fees outside the forum only where attorneys from outside the forum are necessary). The court's findings, however, were premised on sufficient probative and relevant data to withstand ASARCO's clear error challenge.

ASARCO next contends that its arguments apply equally to Jordan Hyden and that, even if exceptional performance and results alone could justify an enhancement, Jordan Hyden's role in the SCC Litigation was largely administrative and undeserving of an enhancement. Jordan Hyden counters that it played an integral role in the SCC Litigation. While Jordan Hyden served as local counsel, the enhancement it received was less than 3% of that awarded to Baker Botts. The district court also addressed Jordan Hyden's importance at length, finding that its services were "necessary to the trial," "essential to the overall result," "necessary to the result," and "part and parcel of the same team effort that achieved an extraordinary result." There is no clear error.

ASARCO finally asserts that the fee enhancement was not "supported by both specific evidence on the record and detailed findings by the lower courts." *Pilgrim's Pride*, 690 F.3d at 656 (internal quotation marks and citations omitted). We disagree. The bankruptcy court explained in detail how "rare and exceptional" the circum-

stances are. The bankruptcy court found that "Baker Botts's services were instrumental in producing the exceptional results." Baker Botts addressed "an array of challenging legal issues with sophistication, creativity, and skill," something for which the court considered "[f]ew firms in the country to have the breadth and depth of experience in different disciplines necessary." "Baker Botts performed at an exemplary level in a wide spectrum of legal specialties." The results were "nothing less than extraordinary," that is, "probably the most successful Chapter 11 of any magnitude in the history of the [Bankruptcy] Code." Baker Botts "contributed significantly" by performing in "an extraordinary fashion in numerous areas." The court added that "[s]uch an extraordinary result would have seemed far fetched at the outset" of the bankruptcy as "[c]reditors were expected to receive cents on the dollar." The result was that "ASARCO was transformed from a broke and broken company to a reorganized ASARCO, cleansed of its historical liabilities and well-positioned to compete effectively in the world of commerce." While pouring accolades on the firm's overall representation of the debtor, however, the bankruptcy court did not award Baker Botts (or Jordan Hyden) an enhancement for most of its work because, as the court found, a number of factors converged to enable a successful reorganization.

The court singled out the firms' prosecution of the SCC Litigation for fee enhancement precisely because it ascribed success to their efforts alone. The court described the SCC Litigation as ASARCO's "crown jewel." "Baker Botts was able to quickly and efficiently" prevail "[t]hrough its creativity, tenacity, and legal talent." The court found the results "were due to Baker Botts's performance and not to inferior performance by opposing

counsel, unanticipated defense concessions, unexpectedly favorable rulings, a sympathetic fact-finder, or simple luck." Most impressive, Baker Botts won the trial "by deciphering millions of pages of documents and using those documents to tell a compelling story primarily out of the mouths of adverse witnesses." The result was a judgment "valued in excess of $6 billion" that was "most likely the largest fraudulent transfer verdict in United States history." That judgment "promised a far more meaningful recovery for creditors than originally anticipated" because of results achieved by Baker Botts that were "without question, rare and extraordinary by any possible measure." The bankruptcy court could hardly have been more specific and detailed as to Baker Botts's "rare and exceptional" performance than it was while placing this description in the context of its 85-page opinion on fees.

The bankruptcy court also found that Jordan Hyden was "involved in the overall planning and strategy with Baker Botts" and active at both the "top strategy level" and in the "day-to-day, often emergency, work" of the bankruptcy. Regarding the SCC Litigation, Jordan Hyden was "not an active trial participant" but prepared "twice-daily summaries of the trial" that "kept the entire Chapter 11 teams of lawyers and staff up to date on the SCC Litigation" and "assisted in the physical planning of [the] trial." Consequently, Jordan Hyden's attorneys were an integral part of a successful team effort that was central to the success of the bankruptcy, and the bankruptcy court was within its discretion to award Jordan Hyden the modest fee enhancement.

B. Fees for Defense of Fees

The parties debate at length the bankruptcy court's award of counsel fees for counsel's defense of their fees

for representing the debtor. The issues presented transcend debtor's counsel, because Section 330(a) governs compensation of all professionals whose fees are paid by the bankruptcy estate.[6] Case law addressing this question is divided, *see generally* 3 COLLIER ON BANKRUPTCY ¶ 330.03[16][a] (16th ed. 2013). We conclude that, correctly read, Section 330(a) does not authorize compensation for the costs counsel or professionals bear to defend their fee applications.

Relevant here, Section 330(a)(3) instructs the court to consider "all relevant factors" concerning the professional services rendered, "including" "whether their services were necessary for the administration of, or beneficial . . . toward the completion of a case ," and "whether the compensation is reasonable" based on charges by comparable practitioners in non-bankruptcy cases. Section 330(a)(3)(C), (F). Compensation is not allowed for services that were not reasonably likely to benefit the debtor's estate *or* necessary to case administration. Section 330(a)(4)(with immaterial exceptions). Finally, "[a]ny compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application." Section 330(a)(6).

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[6] After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103–(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and (B) reimbursement for actual, necessary expenses.

11 U.S.C. § 330(a)(1).

Parties in interest as well as the United States Trustee are entitled to receive notice and the opportunity for a hearing to question bankruptcy professional fees. Section 330(a)(1). Implicit in this procedure is the possibility of fee litigation. Nevertheless, Section 330 states twice, in both positive and negative terms paraphrased above, that professional services are compensable only if they are likely to benefit a debtor's estate or are necessary to case administration. *Matter of Pro-Snax Distributors, Inc.*, 157 F.3d 414, 418 n.7 (5th Cir. 1998). The primary beneficiary of a professional fee application, of course, is the professional. While the debtor's estate or its administration must have benefitted from the services rendered, the debtor's estate, and therefore normally the creditors, bear the cost. This straightforward reading strongly suggests that fees for defense of a fee application are not compensable from the debtor's estate. The Eleventh Circuit adopted this interpretation in a factually similar case, holding that " the issue is whether the services rendered were reasonable and necessary to the administration of the estate. [internal citation omitted] The answer to this question is no. The subject of the [appeal and cross-appeal] was the fee to be paid to Bergwerk for his services rendered in the administration of the estate. The appeals brought absolutely no benefit to the estate, the creditors, or the debtor." *Grant v. George Schumann Tire & Batt. Co.*, 908 F.2d 874, 882-83 (11th Cir. 1990).

Further supporting this interpretation is Section 330(a)(6), which limits potential professional fees in two ways. First, the specification of an award for "preparation of a fee application" is clearly different from authorizing fees for the defense of the application in a court hearing. Second, tailoring the award to the "level and

skill reasonably required to prepare the application" emphasizes scrivener's skills over other professional work. It is untenable to construe this language alone to encompass satellite litigation over a fee application. Had Congress intended compensation for professional fee applications to be allowable as "reasonable and necessary" under Section 330(a)(3)(C), there would have been no need to create the limits specified in subdivision (4). The broad reading of Section 330(a)(3)(C) urged by Baker Botts would render Section 330(a)(4) superfluous.

Several arguments are made in favor of reimbursing fees for the defense of fees from the debtor's estate. One argument is that because resolving professional fees is required to close a case, their litigation is a reasonable and necessary aspect of estate administration. *See In re Smith*, 317 F.3d 918, 929 (9th Cir. 2002). The *Smith* court ultimately held that such compensation rests within the bankruptcy court's discretion to award fees for "reasonable and necessary" work, but it also recognized circumstances, such as counsel's failure in defending its fees, where awards would not be permissible. *In re Smith*, 317 F.3d at 927-929. The *Smith* court posited a broader scope for the Section 330(a) test for the reasonableness and necessity of services to the debtor's estate than does *Grant*, but we agree with *Grant*'s view as more closely reflecting the statute's plain meaning.

In re Smith actually demonstrates the tension in applying the test of reasonableness and necessity *to the debtor's estate* when it comes to litigation over fee applications in bankruptcy. It cannot be denied that in bankruptcy, "almost everyone loses something." *Grant*, 908 F.2d at 882 (internal quotation omitted). In ordinary cases, where there is no 100% payout to creditors, every dollar paid for administrative expenses including profes-

sional fees detracts from the unsecured creditors' recovery. Litigation of professionals' fee applications may become substantial, costly and time-consuming if counsel can be compensated for their self-interested efforts. Such litigation is detrimental for the debtor if it simply increases the overall administrative costs of the bankruptcy. Moreover, bankruptcy rules require professionals to justify their fee applications with detailed, itemized billing records precisely to assure their integrity and sharpen any potential disputes. *See, e.g.*, Fed. R. Bankr. P. 2016; Bankr. S.D. Tex. R. 2016-1. Compliance with the rules should ordinarily reduce the need for or likelihood of success of satellite litigation over fees.

Baker Botts analogizes granting "fees for fee defense" in bankruptcy to the procedure under federal fee shifting statutes, where counsel's time spent to prepare, litigate and appeal a fee award is often compensable. *See, e.g.*, *Cruz v. Hauck*, 762 F.2d 1230, 1233-34 (5th Cir. 1985)(interpreting 42 U.S.C. § 1988). We disagree. These fee shifting statutes create an incentive for otherwise financially disadvantaged plaintiffs to obtain legal redress. Because Congress designed fee shifting provisions in express derogation of the American Rule that each party to litigation bears its own costs, the losing party should bear the full costs of counsel for the winner. In bankruptcy, the equities are quite different. Both the debtor and creditors have enforceable rights, and there is a limited pool of assets to satisfy those rights and compensate court-approved professionals; in certain cases, moreover, professionals paid from the debtor's estate represent competing interests. No side wears the black hat for administrative fee purposes. In the absence of explicit statutory guidance, requiring professionals to defend their fee applications as a cost of doing business is con-

sistent with the reality of the bankruptcy process.[7] The perverse incentives that could arise from paying the bankruptcy professionals to engage in satellite fee litigation are easy to conceive.

Another argument favoring compensation for "fees for fee defense" rests on Section 330(a)(4), the comparability factor. Without reimbursement for "defense fees," it is contended, a professional firm's compensation will be unfairly diluted below what comparably skilled practitioners receive in non-bankruptcy cases. This case, in which Baker Botts expended $5 million to defend its core fee award of over $113 million (excluding the enhancement), allegedly epitomizes such dilution. The claim for comparability is easily made but difficult to analyze. The Bankruptcy Code plainly intended to erase the "economy of the estate" rule under pre-existing law and thus raise the professional fees. *In re Pilgrim's Pride*, 690 F.3d at 654-55. Beyond that, there is no litmus test to determine the comparability of professional services in bankruptcy and other practice areas. Applying reasonably comparable hourly rates and adjusting professional compensation in light of specific circumstances maintain rough comparability in practice. More cannot easily be demanded. Some courts, under the aegis of enforcing comparability, have even withheld fee enhancements to bankruptcy firms because they are not customary in transactional representation, *see Matter of UNR Industries, Inc.*, 986 F.2d 207, 209-210 (7th Cir. 1993). Others have noted that professional bankruptcy rates have sometimes outpaced those of other practice areas. 3 COLLIER ON BANKRUPTCY ¶ 330.03[12] (16th ed. 2013). In this case, the huge

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[7] When firms become aware that they may not be reimbursed for defending core fee applications, they can anticipate this possibility in their hourly rates and by thoroughly documenting fee applications.

cost of defending Baker Botts's core fees seems a drastic reduction in absolute terms, but it amounts to only about 4.4% of the core fee. Whether a deduction of this percentage renders the core fee non-comparable to charges by equally skilled practitioners in other types of legal practice is in the eye of the beholder.

One astute bankruptcy court turned a claim of dilution for non-comparable fees against the professional fee applicant with the following reasoning: "Because the American Rule applies absent explicit statutory or contractual authority, and because the Code contains no statutory provision for the recovery of attorney fees for *defending* a fee application, counsel should *not* normally be able to recover fees for defending a fee application in the bankruptcy court." *In re Teraforce Tech. Corp.*, 347 B.R. 838, 867 (Bankr. ND Tex. 2006) (emphasis added). *See also In re Frazin*, 413 B.R. 378, 400-07 (Bankr. N.D. Tex. 2009), *In re JNS Aviation, LLC*, No. 04-21055-RLJ-7, 2009 WL 80202 (Bankr. N.D. Tex. 2009) (adopting *Teraforce*). In federal court, the American Rule prohibits awards of counsel fees to a prevailing party absent statutory authority, contractual authorization, or "special circumstances." *In re Teraforce*, 347 B.R. at 866 n.64. Baker Botts asserts that the American Rule is inapplicable in bankruptcy, because the statutory provision for professional compensation overrides the American Rule. The only authority cited for this proposition is a footnote in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y.*, 421 U.S. 240, 260 n.33, 95 S. Ct. 1612, 1623 n.33, 44 L. Ed. 2d 141 (1975) (citing the Bankruptcy Act of 1898 as an example of an explicit statutory fee provision to which the American Rule did not apply). More important than the extensive list of federal statutes cited by the Court in that footnote, however, is the accompanying text:

> What Congress has done, while fully recognizing and accepting the general rule, is to make specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights. [fn. omitted]. These statutory allowances are now available in a variety of circumstances, *but they also differ considerably among themselves.*

Id. (emphasis added). The Court in *Alyeska* was hardly endorsing the interpretation of Section 330 fee compensation that Baker Botts persuaded the bankruptcy court to adopt. In any event, the Bankruptcy Act's compensation provision was significantly reworked by the more elaborate framework of Section 330, and, as has been discussed, Section 330 is not fairly read to include "fees for defense of fees" either as reasonable, necessary costs of case administration or to prevent dilution of the professional firm's core fees.

Finally, the bankruptcy court here repeatedly expressed concern that if "fees for defense of fees" cannot be awarded to professionals under Section 330, there will be an incentive for parties in interest, any of which can object to professional fees, to "mount objections to extract a fee reduction." The prospect of such objections, in turn, might discourage competent counsel from handling bankruptcy cases. This court, in contrast, observed years ago that, "Too frequently, court-appointed counsel for debtor['s] and the official creditor committees' interests in a case, sharing the mutual goal of securing approval for their fees, enter into a conspiracy of silence with regard to contesting each other's fee applications." *In re Consolidated Bancshares, Inc.*, 785 F.2d 1249, 1255 (5th Cir. 1986).

Be that as it may, this opinion should not be read as encouraging tactical or ill-supported objections to fee ap-

plications. The Bankruptcy Code and rules require ample documentation of fee requests in part to deter satellite litigation. Section 330's capacious reasonableness and necessity standards shield even many unsuccessful professional actions in bankruptcy from attempts at fee reduction. We are confident that bankruptcy courts, practicing vigilance and sound case management, can thwart punitive or excessively costly attacks on professional fee applications. Where appropriate, the courts should not hesitate to implement the exception to the American Rule that allows fee shifting where an adverse party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46, 111 S. Ct. 2123 (1991); *In re Frazin*, *supra*, 413 B.R. at 403. (No issues falling within *Chambers* were raised in response to reorganized ASARCO's fee objections here.)

Conclusion

For the foregoing reasons, the judgment of the district court is AFFIRMED as to fee enhancements awarded to Baker Botts and Jordan Hyden but REVERSED as to additional fee awards for litigation concerning their fee applications.

AFFIRMED IN PART, REVERSED IN PART.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS BROWNSVILLE DIVISION

Case No. 2:11-CV-290
Bankruptcy Case No. 05-21207

IN RE:
ASARCO LLC,
Debtor.

ASARCO LLC,
Appellant.

V.

BAKER BOTTS, L.L.P. and JORDAN, HYDEN, WOMBLE, CULBRETH & HOLZER, P.C.,
Appellees.

(August 8, 2012)

MEMORANDUM OPINION AND ORDER ON THE FEE APPLICATION OF BAKER BOTTS, L.L.P

The primary issue in this case presents the Court with a somewhat unusual, but, in substance, a very simple question. Its answer is not nearly so simple. The answer is complex in legal terms and has competing equitable arguments that make this Court's ruling somewhat harsh

or conversely somewhat generous depending on one's point-of-view. The primary question before the Court is:

> Should a well-compensated law firm that performed superbly in a hotly contested adversary proceeding, and whose client, the debtor, received an extremely favorable result, receive compensation in addition to its agreed upon and approved professional rates, due to the benefit the result conferred upon the estate?

ASARCO, the debtor in the bankruptcy and the plaintiff in the adversary case, was represented by Baker Botts, L.L.P. (hereinafter "Baker Botts") and Jordan, Hyden, Womble, Culbreth & Holzer, P.C., its local/co-counsel (hereinafter "Jordan Hyden") in Corpus Christi and Brownsville.[1] This Court has on more than one occasion described this case as perhaps the most successful outcome in bankruptcy history. The Bankruptcy Court has also used glowing terms to describe the overall results achieved, including the fact that ASARCO exited bankruptcy with approximately $1.4 billion in cash and with comparatively little outstanding debt. This result includes the resolution of very serious environmental, asbestos, and toxic tort issues.

All parties have conceded in one forum or another and the Bankruptcy Court found that an integral, if not the critical factor of the overall success was the judgment entered by this Court in Civil Action No. B-07-018; ASARCO LLC; Southern Peru Holdings, LLC vs.

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[1] ASARCO will be referred to merely as "ASARCO" if the reference pertains to ASARCO prior to plan confirmation, but it will be referred to as "Reorganized ASARCO" if the reference is to the post-confirmation entity. Additionally, the Court will refer to the parties in bankruptcy ASARCO and its various subsidiaries in the singular either as "ASARCO" or "Debtor."

Americas Mining Corporation (hereinafter the "SCC" case). This adversary trial resulted in a verdict returning all of the transferred stock in Southern Peru Copper Company to ASARCO along with over a billion dollars in cash. The value of this stock was estimated by the parties to be in excess of $6 billion with some estimates going as high as $9 billion. This judgment directly led to the overall resolution of the bankruptcy on terms favorable to the debtor and resulted in a 100% payment (including interest and attorneys' fees) to all creditors. This verdict was the result of a hard fought case that was tried to the Bench over a period of four (4) weeks. Both sides were represented by competent counsel and the performance of all counsel involved would rank them in the highest echelon of the nation's legal community. The lawyers for both sides, while adversaries, worked together in a manner which represented the best traditions of the legal profession. In fact, it is a tribute to the professionalism of both sides that the attorneys were able to compact their presentations of quite complicated issues into the four (4) week trial period allotted by this Court.

Not only was the trial complicated, but the pre-trial and post-trial issues were also quite complex. There were five (5) causes of action involving multiple states with various conflict of laws and choice of law issues. The discovery in this case was intense and the Court, given the ongoing bankruptcy, instituted a somewhat shortened time schedule in order to accommodate a quicker resolution. The lawyers had to work diligently to accomplish the needed discovery and timely prepare the case for trial. After the trial, there were multiple post-trial issues, including the issue of how to structure the judgment and the posting of an appellate bond in

preparation for the appeal.[2] In all, this Court wrote opinions on various issues totaling hundreds of pages. A review of the preparation and actual trial of this matter would lead any reasonable person to conclude that the lawyers involved in the case performed superbly, professionally, and that they diligently prosecuted and/or defended the case. These conclusions are unavoidable and, quite frankly, are not seriously contested in this appeal.

The primary contested issue in this matter is whether the lawyers representing ASARCO are entitled to an enhancement of their fees based upon the result they achieved for the Debtor's estate. The Court notes that while the Bankruptcy Court's opinion goes to great lengths to praise Baker Botts's overall representation of the Debtor, the fee enhancement in this appeal is based solely on its handling of the SCC case in this Court. The Bankruptcy Court did not award any enhancement based upon the overall handling of the protracted bankruptcy proceedings, holding, in effect, that Baker Botts's performance was superb, but was the quality to be expected from well-trained, hard-working, and well-compensated professionals. Thus, this Court has not only the record before it from the Bankruptcy Court below, but also has intimate knowledge of the case that is the basis of the enhancement. While it has such knowledge and may, in the following pages below, reference that knowledge for the purpose of context (or to set the scene of certain issues), it will limit its consideration of this appeal to that of any district court sitting as an appellate court in a bankruptcy proceeding. In other words, it will

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[2] A bond was posted and an appeal was initiated. The appeal was ultimately dismissed after the Parent's Plan was confirmed by this Court.

not substitute its own factual knowledge or beliefs for the findings of the court below. The Court therefore will:

> . . review the bankruptcy court's award of attorneys' fees for abuse of discretion. *In re Coho Energy, Inc.*, 395 F.3d 198, 204 (5th Cir. 2004); *In re Barron*, 325 F.3d 690, 692 (5th Cir. 2003). An abuse of discretion occurs where the bankruptcy court (1) applies an improper legal standard or follows improper procedures in calculating the fee award, or (2) rests its decision on findings of fact that are clearly erroneous. *In re Evangeline Refining Co.*, 890 F.2d 1312, 1325 (5th Cir. 1989). Accordingly, we review the bankruptcy court's legal conclusions de novo and its findings of fact for clear error. *Coho Energy*, 395 F.3d at 204; *Barron*, 325 F.3d at 692.

In re Cahill, 428 F.3d 536, 539 (5th Cir. 2005).

I. Background and Issues Presented

As stated earlier, the issues presented on this appeal are fairly straightforward: (1) did the Bankruptcy Court err in awarding the fee enhancement; (2) did the Bankruptcy Court err in awarding attorneys' fees and expenses for the preparation and defense of the fee application (which included the prosecution of the request for the fee enhancement); and (3) was the Bankruptcy Court's award of post-judgment interest on these amounts in error?

The pertinent background in this matter is also straightforward, especially when one considers how complicated and protracted some of the bankruptcy issues in the underlying case actually were. The Debtor hired Baker Botts as Debtor's counsel initially for some of its subsidiaries and then later for itself. Baker Botts was initially engaged in 2005. Jordan Hyden served as

counsel for ASARCO's subsidiaries which preceded ASARCO into bankruptcy, as local counsel in Corpus Christi where the ASARCO bankruptcy was actually filed, and also as local counsel in the SCC litigation in Brownsville. The bankruptcy continued for a number of years and included a variety of legal, factual, and economic hurdles until finally a plan of reorganization was confirmed by this Court in November of 2009. The bankruptcy result was a resounding success regardless of the measurement used. The debtor emerged as a financially sound, functioning entity. All of the creditors were completely paid (including interest and attorneys' fees). Potential creditors such as possible asbestos or environmental claimants were protected by well-funded trusts. The ultimate success of this bankruptcy process can be attributed to a number of factors, but regardless as to how one analyzes these, one cannot escape the conclusion that the SCC judgment was the single biggest factor that led to this success.

In its final fee application to the Bankruptcy Court, Baker Botts asked the Court to approve $135,870,714.58 in fees and $6,046,135.06 in expenses of which $113,074,527.74 had already been approved on an interim basis under § 331. The unapproved amounts were categorized by the Bankruptcy Court as follows:

1. $263,994.74 - additional unpaid fees (between November 1, 2009 and December 8, 2009).
2. $22,645,119.10 - fee enhancement to fees already charged based upon a § 330 and lodestar analysis.
3. Minus $112,927.00 as a voluntary credit.
4. $8,004,920.50 in fees and $457,443.83 in expenses incurred by the firm in preparing and defending the fee application through July 13, 2010

(comprised of $5,042,001.50 in fees and $199,900.60 in expenses defending the fees that had been approved on an interim basis and those sought through December 8, 2009; $2,684,243.50 in fees and $252,883.23 in expenses for pursuing its 20% enhancement request; $42,845.50 in fees incurred for non-working travel time through July 6; and $235,830.00 in fees and $4,660.00 in expenses estimated to carry it through the fee application process).

The Bankruptcy Court held multiple hearings, heard testimony and argument, and ultimately in a thorough opinion, ruled that Baker Botts should recover:

1. $117,387,304.44 in fees and $6,046,135.06 in expenses (comprised of $113,074,527.74 in fees already approved on an interim basis); (2) $263,994.74 unpaid fees incurred between November 1, 2009 and December 8, 2009 plus a $4,161,708.96 enhancement based upon its services in a rare and extraordinary circumstance; *minus* the $112,927.00 voluntary credit. The $6,046,135.06 figure was comprised of: (1) 6,065,598.58 of expenses already approved *minus* $19,463.52 voluntary credit.
2. $5,000,000.00 in fees and $457,443.83 in expenses for preparing and defending its fee application.
3. Post-judgment interest on all accrued amounts.

As stated above, Reorganized ASARCO, the United States Trustee, and the Plan Administrator complain in varying degrees that the Bankruptcy Court erred in including in the above awards the following items:

1. A $4,161,708.96 enhancement for the SCC litigation.

2. The $5,457,443.83 in fees and expenses for the preparation and defense of its fee application.
3. The award of post-judgment interest.

Finally, both the office of the United States Trustee and Reorganized ASARCO joined in an additional argument. They argue that the Court should apply the same test for approving a fee enhancement that the Supreme Court set forth in *Perdue v. Kinney*, _ U.S. _, 130 S.Ct. 1662, 176 L.Ed. 2d 494 (2010). They assert that if this Court does that, it will be forced to conclude that the award of the enhancement made by the Bankruptcy Court was in error.

The response by Baker Botts is likewise simple. Initially, by national standards, it claims it was undercompensated by up to 20%. The Bankruptcy Court made a finding of under-payment and there is evidence to support it. Secondly, it argues that it successfully prosecuted the largest fraudulent transfer case in United States history. That judgment proved to be the decisive factor in having two 100% payment reorganization plans. The Bankruptcy Court found that the Parent effectively paid $1 billion for the judgment by virtue of its reorganization plan. Consequently, if there was ever a case where a fee enhancement is appropriate, this is it.

Baker Botts also argues that *Perdue v. Kinney* was a fee-shifting case and that the entire rationale underlying the majority opinion is the concept of shifting fees. Consequently, Baker Botts concludes it has no application in a bankruptcy context. Lastly, it argues that even if one applies the guidelines set out in *Perdue v. Kinney*, the record before the Bankruptcy Court supports the enhancement.

II. The Application of Perdue v. Kinney to this Case

The Trustee and the Reorganized Debtor argue that the dictates of the Supreme Court in *Perdue v. Kinney* control the outcome of this fee application. *Perdue* was a case involving the award of a fee enhancement in a federal fee-shifting context. Appellant argues here that had the Bankruptcy Court followed the rules set out in *Perdue*, it would have been forced to deny the fee enhancement. This Court has delayed its ruling in hopes that the Fifth Circuit would resolve the issue of the application of *Perdue* to bankruptcy cases. The Circuit has heard oral argument, but not issued a ruling, in *CRG Porters L.L.C. v. United States Trustee*, 445 B.R. 667 (N.D. Tex. 2011), in which the District Court held that *Perdue* did not apply to bankruptcy cases. The resolution of that case will in all likelihood resolve this legal issue.

Baker Botts claims that it is entitled to the fee enhancement regardless of the application of *Perdue*. It claims that the evidence adduced by the Bankruptcy Court satisfies the stricter standards for fee enhancements set out in *Perdue*.

The majority opinion in *Perdue* severely restricts the award of fee enhancements. The guidelines it sets out are as follows:

1. A reasonable fee is that sufficient to induce a capable attorney to undertake the case.
2. The lodestar method yields a fee that is presumptively sufficient to reach this objective

3. Enhancements may be awarded in "rare" and "exceptional" circumstances.[3]
4. A "lodestar" calculation includes most, if not all, of the relevant factors constituting reasonable attorney fees *and* an enhancement may not be based upon a factor already subsumed in the lodestar calculation.
5. The burden of proof is always on the proponent of the enhancement.
6. One seeking an enhancement must produce specific evidence to support the award.

It is certainly important to note that the Court introduced these guidelines by describing them as being gleaned from their prior *fee-shifting* cases. *Perdue v. Kinney*, 130 S.Ct. at 1672-73.

Having delineated these instructive principles, the Court then described a few factual scenarios which would support a fee enhancement in excess of the lodestar calculation, only the first of which arguably applies. They include cases:

1. Where the method used to calculate the hourly rate in the lodestar calculation does not adequately measure the attorney's true market value (as demonstrated during the litigation);[4]

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[3] Interestingly, this guideline was preceded by the Court's aside that it had never yet affirmed an enhancement.

[4] Baker Botts argues, based upon the results, that it fits under this exception. In doing so, however, it ignores crucial passages in the majority opinion. The first was the discussion immediately following the Court's announcement of this exception. The Supreme Court included the caveat that skill and experience are factors considered in the hourly rate. It hypothesized that an enhancement situation might occur when the hourly rate was based solely upon a single factor-such as years in practice, but it mandated that a court must

2. Where an attorney's performance includes an extraordinary outlay of expenses and the litigation is protracted;[5]

3. Where extraordinary circumstances delay payment.[6]

The Court, more importantly for this case, engaged in two specific discussions. First, it specifically rejected the concept that an enhancement is appropriate merely because departures from hourly fees are becoming more frequent. The second discussion, and more importantly one that Baker Botts seems to gloss over, centered on whether the quality of an attorney's performance and/or the results obtained may provide a basis for an enhancement. The Court first decided to treat these two factors as one since superior results are only relevant to fee enhancements to the extent that they are the result of outstanding attorney performance (as opposed to luck,

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make specific findings concerning that lawyer and the prevailing market rate. Baker Botts contends that this case is an example of what the Supreme Court was anticipating. There was testimony that Baker Botts's rates were 20% below competitive national firms, and arguably this evidence could have been used, under non-*Perdue* case law, to adjust the lodestar calculation. Nevertheless, no findings, such as those contemplated by the Supreme Court's opinion in *Perdue*, exist here. Baker Botts used its regular rates. It did not bill ASARCO, as it has to other clients, a premium or discount rate. Further, the uncontroverted testimony indicates that multiple factors went into the establishment of Baker Botts's standard rates in this case such as the skill of the lawyer; the ability of the lawyer to handle novel and complex issues; the location of the lawyer; the creativity, skill, and experience of the lawyer; the ability to make critical legal maneuvers and deliver whatever brilliance the individual has to offer. (*See* testimony of Jack Kinzie).

[5] The enhancement must be reasonable and objective, and limited to compensation for the delay in reimbursement.

[6] Again, the Court suggested that the delay in certain fee-shifting cases is usually taken into consideration by a rate adjustment.

inferior performance by defense counsel, unexpectantly favorable court rulings, etc.). The Court then held:

> We conclude that there are few such circumstances, but these circumstances are "rare" and "exceptional" and *require specific evidence that the lodestar fee would not have been "adequate to attract competent counsel"* [citing *Blum v. Stenson*, 465 U.S. 886, 897 (1984)].

Id. at 1674 [emphasis added].

This Court finds that if *Perdue* applies to this case, the enhancement of the SCC fees cannot stand. There is no proof in the record that would support a finding that the approximately $20 million ($354 per hour blended rate) paid to Baker Botts, pursuant to the lodestar calculation for the SCC case, would not have attracted other competent counsel.[7] Clearly, for a blended rate (which included non-lawyers) of $354 competent lawyers could have been found to try the SCC case. The result may not have been the same, but that does not change a *Perdue* analysis.

Having found that *Perdue* would require a reversal of the enhancement award if applied, this Court hereby declines to apply *Perdue* in this case. There are any number of reasons, both factual and legal, why the rules espoused in the *Perdue* case should not apply to bankruptcy cases—not the least of which is the very limiting language used by the Supreme Court itself. This language (and many other reasons) have been articulated by the Bankruptcy Court, and other courts cited in that opinion, and need not be reiterated here. This Court

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[7] Not surprisingly, given the lack of evidence on this topic, there is no finding by the Bankruptcy Court that adequate counsel could not have been hired for this amount.

agrees with the general reasoning outlined in those decisions.

There is an additional reason that this Court will not apply *Perdue* to this case. This Court would not hesitate to apply Supreme Court precedent—even if it effectively overruled Fifth Circuit precedent—where it clearly applies. Here, however, it does not clearly apply and any expansion of the *Perdue* rulings should be left to the Circuit. The new application of law to a different category of cases—especially when it would contravene the spirit, if not the exact holding, of a multitude of Fifth Circuit cases resides solely within the province of the Circuit itself.

The Fifth Circuit has written on multiple occasions on the topic of fee awards in bankruptcy cases.

> The Fifth Circuit has traditionally used the lodestar method to calculate "reasonable" attorneys' fees under § 330. *In re Fender*, 12 F.3d 480, 487 (5th Cir. 1994). A court computes the lodestar by multiplying the number of hours an attorney would reasonably spend for the same type of work by the prevailing hourly rate in the community. *Shipes v. Trinity Indus.*, 987 F.2d 311, 319 (5th Cir. 1993). A court then may adjust the lodestar up or down based on the factors contained in § 330 and its consideration of the twelve factors listed in *Johnson*, 488 F.2d at 717-19. *See Fender*, 12 F.3d at 487. While the bankruptcy court has considerable discretion in applying these factors, *In re First Colonial Corp. of America*, 544 F.2d 1291, 1298 (5th Cir. 1977), it must explain the weight given to each factor that it considers and how each factor affects its award. *Fender*, 12 F.3d at 487; *Evangeline Refining Co.*, 890 F.2d at 1327-28 ("If a court awards fees but fails to explain why

compensation was awarded at the level it was given, it is difficult, if not impossible, for an appellate court to engage in meaningful review of a fee award.").

In re Cahill, 428 F.3d 536, 539-40 (5th Cir. 2005). *See also, In the Matter of Bacock & Wilcox Company*, 526 F.3d 824 (5th Cir. 2008); *In re Fender*, 12 F.3d 480 (5th Cir. 1994).

While these cases obviously predate *Perdue*, they set out a general procedure that district and bankruptcy courts in this Circuit have followed for decades. District courts are bound by the law of their circuit. *Campbell v. Sonat Offshore Drilling Inc.*, 979 F.2d 1115, 1121 n.8 (5th Cir. 1992); *Sturgeon v. Struchan Shipping Co.*, 698 F.2d 798, 800 (5th Cir. 1983). That being the case, the Court will not apply *Perdue* outside the fee-shifting factual scenario for which it was written unless so directed by the Circuit.

Therefore, the Court finds as a matter of law that *Perdue* does not apply to this case. Nevertheless, if it had to apply *Perdue* to this case, this Court would find as a matter of law that the evidence is insufficient to support the award of the enhancement for the SCC litigation. If *Perdue* controls, the Bankruptcy Court abused its discretion in awarding the fee enhancement and made a mistake of law in not actually applying *Perdue*, as opposed to merely referencing the principles espoused therein.

III. The Fee Enhancement Award

The fee opinion authored by the Bankruptcy Court sets out in exacting detail the overall history of the bankruptcy, the ultimate success, and the role played by the lawyers at Baker Botts. This Court sees no need to duplicate that Court's factual recitation. That Court's

conclusion that the results in this case "are nothing short of extraordinary" has already been echoed by this Court in several prior orders. For example, in its confirmation order, this Court described this bankruptcy proceeding as "one of the most successful bankruptcy proceeds in recent history" [Doc. No. 79-9 CV 00177 at p. 4]. Not only are the results in this case phenomenal, but the results actually are benefitting Reorganized ASARCO, the appellant, on a daily basis. It went from a near Chapter 7 state to a thriving company freed not only from the overwhelming burdens placed upon it by environmental, asbestos, and toxic tort litigation, but also freed from the labor strife which had plagued it for years.

Counsel for Reorganized ASARCO are willing to concede, while perhaps in less superlative terms, the overall success of the process. They are also willing to concede, and have on other occasions conceded, the role played by the SCC judgment. Their argument against the fee enhancement focuses on two main points. The first point is quite legalistic. Each time Baker Botts received an interim payment, they represented to the Bankruptcy Court, prior to its approval, that the fees were fair compensation for the work performed. That being the case, Reorganized ASARCO argues that Baker Botts cannot now, after the completion of the case, complain that it was underpaid.

A separate, but perhaps overlapping point put forth by Reorganized ASARCO is less steeped in legalistic terms and more based in common everyday parlance. It argues that Baker Botts agreed to work for these fees and they have been paid the agreed upon fees. In fact, they have been paid in excess of $100 million. As with any quality law firm, it was expected that they would provide quality legal services. The fact that it achieved superlative

results should not be grounds for a court to second guess the fee arrangement. Put another way, if the results were merely good, mediocre, or bad, Baker Botts was not going to pay Reorganized ASARCO back the agreed-upon fees—so why should Reorganized ASARCO pay more merely because the results were better than expected? (A subtext of this argument would also be to question the reasons for the good results: was it great legal work or the rise in the price of copper that ultimately proved to be the critical factor? If the latter, then why should Baker Botts collect a premium?) Underlying both points is also the basic tenant of bankruptcy law that while a professional performing in a bankruptcy context should be paid comparable to when that professional performs in a non-bankruptcy context, a professional should not be overpaid merely because a judge has the ability to readjust income levels at the end of the case.

A. The Law Concerning Fee Enhancements

The Bankruptcy Court awarded a 20% enhancement for the extraordinary success Baker Botts achieved in the SCC case. The law concerning attorneys' fees in bankruptcy is quite established. The Fifth Circuit has summarized it as follows:

> Calculation of Attorneys' Fees
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> Section 330 of the Bankruptcy Code gives bankruptcy courts discretion to award reasonable compensation to debtors' attorneys in bankruptcy cases. 11 U.S.C. § 330(a)(1)(A). This authority includes the discretion, upon motion or *sua sponte*, to "award compensation that is less than the amount requested." *Id.* § 330(a)(2). Section 330(a)(3) further directs courts to "consider the nature, the extent, and the value of" the legal services provided when determining the amount

of reasonable compensation to award, taking into account "all relevant factors," including, but not limited to:

> (A) the time spent on such services;
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> (B) the rates charged for such services;
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> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
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> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and
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> (E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Id. § 330(a)(3).

The Fifth Circuit has traditionally used the lodestar method to calculate "reasonable" attorneys' fees under § 330.[8] *In re Fender*, 12 F.3d 480, 487 (5th Cir. 1994). A court computes the lodestar by multiplying the number of hours an attorney would reasonably spend for the same type of work by the prevailing hourly rate in the community. *Shipes v. Trinity Indus.*, 987 F.2d 311, 319 (5th Cir. 1993). A court then may adjust the lodestar up or down based on the factors contained in § 330 and its consideration of the twelve factors listed in *Johnson*, 488 F.2d at 717-19.[9]

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[8] The lodestar method is traditionally attributed to the Third Circuit in *Lindy Bros. Builders, Inc. of Phila. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3rd Cir. 1973).

[9] The *Johnson* factors are as follows:

> *See Fender*, 12 F.3d at 487. While the bankruptcy court has considerable discretion in applying these factors, *In re First Colonial Corp. of America*, 544 F.2d 1291, 1298 (5th Cir. 1977), it must explain the weight given to each factor that it considers and how each factor affects its award. *Fender*, 12 F.3d at 487; *Evangeline Refining Co.*, 890 F.2d at 1327-28 ("If a court awards fees but fails to explain why compensation was awarded at the level it was given, it is difficult, if not impossible, for an appellate court to engage in meaningful review of a fee award.").

In re Cahill, 428 F.3d at 539-40.

The burden of proving reasonableness of compensation and reimbursement is on the applicant. *In re Babcock & Wilcox Co.*, 526 F.3d 824, 827 (5th Cir. 2008). There is a strong presumption that the lodestar amount is reasonable. *Saizan v. Delta Concrete Products Company, Inc.*, 448 F.3d 795, 800 (5th Cir. 2006). The lodestar may be adjusted according to a *Johnson* factor only if that factor is not already taken into consideration

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(1) the time and labor required;
(2) the novelty and difficulty of the questions;
(3) the skill requisite to perform the legal service properly;
(4) the preclusion of other employment by the attorney due to acceptance of the case;
(5) the customary fee;
(6) whether the fee is fixed or contingent;
(7) time limitations imposed by the client or circumstances;
(8) the amount involved and the results obtained;
(9) the experience, reputation, and ability of the attorneys;
(10) the "undesirability" of the case;
(11) the nature and length of the professional relationship with the client; and
(12) awards in similar cases.

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-719 (5th Cir. 1974).

by the lodestar calculation. *In re Fender*, 12 F.3d 480, 487 (5th Cir. 1994). At least four (4) of the *Johnson* factors—the novelty and complexity of the issues, the special skill and experience of counsel, the quality of the representation, and the results obtained are presumably included in the lodestar calculation. *Shipes v. Trinity Industries*, 987 F.2d 311, 320 (5th Cir. 1993). Upwards adjustments in bankruptcy cases are permissible provided the application shows rare and exceptional circumstances. *In re El Paso Refinery, L.P.*, 257 B.R. 809, 835 (Bankr. W.D. Tex. 2000).

Thus, an upward adjustment from the lodestar amount may be made if the applicant proves the existence of "rare and extraordinary" circumstances and that these circumstances have not already been included in the lodestar calculation. Various courts have analyzed this in a multitude of ways. Some have suggested that rare and exceptional circumstances exist if there is a full payment of creditors. *In re DWGK Restaurants*, 106 B.R. 194, 197 (Bankr. S.D. Cal. 1989). Other courts look for some special facts that set the case apart from others and whether non-bankruptcy professionals given those same special facts would be able to recover a higher fee for those results. *In re El Paso Refinery, L.P.*, 257 B.R. at 837. That Court emphasized:

> The precise wording is important. The issue is not whether a comparable *firm* would reward its partners and employees for bringing in a good "result" (defined usually in terms of enhanced revenues for the firm) but whether the *client* would feel obliged to pay the *firm* a higher rate in return for a "rare and exceptional" result. In the usual case, it is this court's understanding that such "kickers" are negotiated in advance of the engagement. To the extent that a

> similar "advance agreement" might be seen as a prerequisite, in order to bring our analysis into line with what happens in the marketplace outside of bankruptcy, the facts show that VL "negotiated" for just such a "kicker" in its original retention papers.

Id. at 837-38 n.55. The *El Paso* Court concluded:

> The thrust of the inquiry, then, is whether the surrounding factors of the case are such that, even after having arrived at an appropriate lodestar, a court would still be constrained by the facts to conclude that the resulting hourly rate is *still* too low to fairly compensate the professional, as that professional would be compensated in the non-bankruptcy context for delivering a similar outcome.

Id. at 837.

It suggested a three (3) factor test: (1) whether the professionals encountered unique and unforseen obstacles; (2) whether the results far exceeded expectations at the onset; and (3) whether the party paying for the fee agreed to it.[10] *In re El Paso Refinery L.P.*, 257 B.R. at 839. There seems to be no fixed standard by which a court measures a request for an enhancement. The two rules that seems to appear consistently in all enhancement cases is that the circumstances must be rare and extraordinary and that the court should not double count any factor in the enhancement that was used in the lodestar calculation.

B. The Appropriateness of the Fee Enhancement

In this case, the Bankruptcy Court found that Baker Botts was "underpaid" according to the prevailing rates

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[10] The last factor may be in dispute in this case. At one point, the ASARCO board, by a split vote, voted to support the law firms' enhanced fee requests. Reorganized ASARCO obviously opposes it.

for national firms handling large, complex Chapter 11 cases. The evidence suggested that it was underpaid approximately 20% compared to other national firms in similar cases. This underpayment effectively matched the 20% enhancement Baker Botts requested on its entire fee application. Despite the fact that the end results were superior, the Bankruptcy Court denied this 20% enhancement to Baker Botts. It denied the enhancement due to the fact that Baker Botts's legal work, although outstanding, was the type of legal work expected of a national law firm of its caliber. An enhancement should reward rare and exceptional work and should be tied to both "the effort and the outcome." (Bankr. Opinion ¶ 216).

Nevertheless, the Bankruptcy Court did find that the SCC result was rare and extraordinary and awarded an enhancement solely for Baker Botts's representation in that case. The details of that case are briefly recounted in the opinion of the Bankruptcy Court. Additionally, the issues, results, and complexities of the SCC litigation can be gleaned from the various opinions of this Court. These can be found at *ASARCO LLC v. Americas Mining Corp.*, 382 B.R. 49 (S.D.Tex. 2007); *ASARCO LLC v. Americas Mining Corp.*, 396 B.R. 278 (S.D.Tex. 2008); *ASARCO LLC v. Americas Mining Corp.*, 404 B.R. 150 (S.D.Tex. 2009); *ASARCO LLC v. Americas Mining Corp.*, 419 B.R. 737 (S.D.Tex. 2009); *In re ASARCO LLC*, 420 B.R. 314 (S.D.Tex. 2009). Consequently, there is no need for this Court to rehash that case more than it already has.

The Bankruptcy Court found the extraordinary results were due to the performance of Baker Botts, and not due to any factors that might otherwise make a substantial victory easier (such as those delineated in the

Perdue opinion). It also noted that the task was made even more complicated because Baker Botts had to decipher millions of documents in order to prove its case, and that it had to prosecute the case almost solely without the aid of any friendly company witnesses. The witnesses at the fee hearing uniformly praised the verdict and conceded its role in resolving the bankruptcy. Even Reorganized ASARCO's expert, when testifying against Baker Botts's fee request, agreed the SCC result was "rare" and "extraordinary." Whether it is the largest or second largest unreversed actual damage finding in United States history is debatable.[11] Whether it is actually the largest fraudulent transfer judgment ever, as was suggested by the witnesses, may also be debatable. What is not debatable is that it was, as some testified, the "game-changer." This judgment created the situation where ASARCO went from no plan to two plans that returned the debtor to solvency and paid all creditors 100% of their debt, plus interest and attorneys' fees. It allowed ASARCO to not merely survive, but also to prosper. Its ultimate effect is contained throughout the record and is detailed throughout the opinion of the Bankruptcy Court below.

This Court finds that the recovery of stock and cash worth at least seven billion dollars is both rare and extraordinary. It finds that the Bankruptcy Court did

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[11] Depending on what valuation was placed on the value of the stock of Southern Peru Cooper Company (SPCC) in 2009, the judgment entered by this Court was worth between $7 and $10 billion dollars. At the higher end of this range, this judgment would exceed the prior actual damage figure in the Texas-Pennzoil litigation in which the jury found actual damages of $7.53 billion. At the time that verdict was the largest in United States' history. Counsel has also pointed out that, unlike the judgment in *Pennzoil v. Texaco*, this judgment had a bond protecting it on appeal.

not abuse its discretion in its findings of fact, and that there is an abundance of evidence which supports that court's enhancement award. The trickier question is really one that pertains primarily to a question of law. If a significant result and outstanding attorney performance are always included in the lodestar calculation, then the Bankruptcy Court's conclusion that an enhancement is warranted may be incorrect. Nevertheless, if there is ever a circumstance where attorney performance and significant results can justify an enhancement, this case is it. No lodestar, especially with rates established before the result, contains a built-in factor for a seven billion dollar judgment. A seven billion dollar judgment, which is recoverable, which saves a company, and funds a 100% recovery for all concerned is a once in a lifetime result.[12] This Court hereby affirms the Bankruptcy Court's enhancement of the fees expended in the trial of the SCC case. It realizes that many courts have postulated that good results and legal skills are part and parcel of a lodestar calculation, but these courts also (whether they grant or refuse a fee enhancement) without fail repeat the proposition that an enhancement is still available in rare and extraordinary circumstances. This general proposition is also supported by the law in this Circuit. This Court finds the SCC judgment to be just the rare and extraordinary circumstance that these courts refer to, but rarely find. No one anticipated a judgment as large as this one.

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[12] The Court notes that given the testimony it is arguable that the Bankruptcy Court could have merely adjusted the lodestar amount 20% and reached the same result. Had that scenario occurred, the overall result might have been the same, but the factual attack and legal issues here might have been different. The Court will not directly address this proposition as the Bankruptcy Court made no specific ruling that it adjusted the lodestar.

Consequently, if, as a general proposition, a lodestar calculation in fact includes anticipated results, this lodestar could not have anticipated the SCC result.[13]

IV. Fees of the Preparation and Defense of the Fee Application

Baker Botts sought $8,004,920.50 in fees and $457,443.84 in expenses it incurred in defending its final application for fees. Included in this amount are $2,684,243.50 in fees and $252,883.23 in expenses for Baker Botts's pursuit of the enhancement. The Bankruptcy Court found that the fees requested, while reflecting the actual time billed as per their records, exceeded an amount that would reflect reasonable compensation. It approved $5,000,000.00 in fees and $457,443.83 in fees. The Bankruptcy Court, however, did not delineate what fees of those it awarded were attributable to the preparation and defense of its fee application from those expended on the pursuit of a fee enhancement.

This Court notes that there is not unanimity among courts as to whether debtors' counsel can recover fees for

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[13] This Court's holding that at some level the results obtained here have to be so extraordinary that there is no way they are subsumed in the lodestar rate is limited to the facts of this case. No court has been able to delineate an exacting standard as to where to draw the "rare and extraordinary" line. This Court cannot draw that line so as to make it generally applicable either, but regardless of where any court draws that line, this verdict has to be considered rare. This Court suggests that it is not all that farfetched to make the analogy to Justice Stewart's concurrence in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (concurring). In that concurrence, he wrote the often repeated phrase about his inability to define pornography: "I know it when I see it." This Court cannot devise a one-size-fits-all definition of "rare and extraordinary," but it does recognize it when it sees it. This is it.

the preparation and defense of a fee application. It also notes, as did the Bankruptcy Court, that there is no definitive opinion from our Circuit on this point. The vast majority of courts find that compensating bankruptcy lawyers for the preparation of and the successful defense of their fee applications is necessary to avoid unfair dilution of their fees. The Bankruptcy Court, below, and the many courts referenced in that well-reasoned opinion, accurately set forth the reasons for this policy and this Court will not repeat them here. Suffice it to say that most courts implement this rule as a necessary adjunct to the unambiguous policy underlying Section 330(a) that the pay of bankruptcy professionals should equate to comparable non-bankruptcy pay.

Of importance herein, however, is that both the courts that favor the award of preparation and defense fees and those that do not cite Section 330 as authority. A few courts have declined to award such fees finding that the pursuit of these fees does not benefit the estate. Some hold that the pursuit of fees benefits only the attorneys and is therefore not compensable. Others seem to rely solely on the historic "American" rule that each party bears their own attorneys' fees as a reason for the denial of such an award. Despite those well-intentioned opinions, this Court agrees with the majority view. The time spent defending a fee application "is necessary and beneficial to the bankruptcy system as a whole, and indirectly, to each estate participating in the system." *In re Engman II*, 404 B.R. 467, 483 (W.D. Mich. 2009). To the extent that sums awarded to Baker Botts represent sums expended on the preparation and defense of its fee application, the Bankruptcy Court is hereby **AFFIRMED**.

Baker Botts's actions in resolving outstanding fee issues clearly benefits the estate. The fact that it also benefits Baker Botts does not change the character of its actions. The fees were incurred as part of the bankruptcy, and the bankruptcy case cannot be put to bed until these matters are resolved.

> By definition, every fee petition is for the benefit of the petitioning professional. It is not that the professional benefits that is of consequence; what matters is whether the professional's obtaining of reasonable compensation is also a benefit to the estate. As several citations already provided demonstrate, it has been emphatically determined by the numerous courts that have addressed the issue that reasonable compensation for professionals is a benefit to the estate. . . .
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> If, however, the "no benefit to the estate"argument by the Trustee is based on the premise that there is no longer an estate to benefit—a contention pressed by counsel during oral argument but nowhere evident in the Bankruptcy Court's reasoning—then the answer is that this dispute, like other post-confirmation disputes, must be dealt with as part of the administration of the case. Section 330(a)(4)(ii)(II) expressly allows compensation for services "necessary to the administration of the case." This is such a dispute. Indeed, section 330 anticipates post-confirmation fee applications when it speaks of"compensation awarded for the preparation of a fee application," 11 U.S.C. § 330(a)(6), a process regularly undertaken after confirmation.

In re Worldwide Direct, 334 B.R. 108, 111-12 (D.Del. 2005).

The same, however, cannot be said of the pursuit of a fee enhancement. Regardless of what standard a court adopts in judging fee requests (*Perdue*, a lodestar formula, a *Johnson* 12-step factor test or some combination of all three), seeking more than the agreed upon fee, however well-deserved, cannot be said to benefit the estate.

This Court finds that fees expended on the pursuit of an enhanced fee are not recoverable from the estate pursuant to Section 330. The entire rationale against diluting counsel's fees is inapplicable in a fee enhancement situation. This Court realizes that there might be an overlap between the expenses expended in the preparation and defense of the main fee application and those pertaining to an enhancement request. To the extent there is proof that there exists an indivisible overlap, the fees may be recoverable. Nevertheless, where the line between the fees expended for a fee defense and those expended for the pursuit of an enhancement is clearly distinct, services rendered in the pursuit of a bonus are not likely to benefit the estate and are not recoverable under Section 330.

There is a further reason for denying fees expended for an enhancement request. Section 330 authorizes compensation for services that were "necessary" to the administration of the estate. § 330(3)(A)(C). Stated another way, section 330(4)(A) instructs that the Court shall not award compensation for services that were not necessary to the administration of the estate. § 330(4)(A)(ii)(II). A law firm asking for an enhancement to its fees over and above what it is due under its agreement or pursuant to a lodestar analysis is not performing necessary services for the estate. None of the arguments that pertain to the inclusion of the final

fee applications apply to a request for a bonus. Therefore, this Court holds that any such request for fees and expenses expended in the pursuit of a bonus are not compensable.

There is one additional category of expenses that should not be charged to the estate. In this matter, there was allegedly some $400,000.00 spent by Baker Botts to correct time entries that were either insufficiently described or clumped or otherwise deficient.[14] Keeping accurate and sufficient time records is an inherent part of any professional's overall professional responsibilities. Any hourly billing rate used in a lodestar calculation necessarily and implicitly contains within that rate the time it takes the professional to accurately record her or his time and services. Even the Southern District of Texas Guidelines for Compensation and Expense Reimbursement of Professionals in Complex Chapter 11 Cases has specific requirements for time records. These guidelines forbid "grouping" or "clumping" in billing records, and instruct that all professionals must keep "accurate contemporaneous time records." While one could argue whether a lawyer can bill separately and additionally for writing down his or her time initially, no one can suggest with any credibility that it is reasonable for the estate to pay a professional to reconstruct time records that were initially done incorrectly.

Baker Botts in this appeal represented to this Court that it sought $8 million in fees, plus hundreds of

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[14] The Court notes that there is arguably evidence that some of these funds might have been expended solely to refute meritless objections. Sums spent to refute an objection to the primary fee request are a necessary adjunct to a fee request and are recoverable. The Court also notes that various individuals mentioned various sums attributable to this category of expenses.

thousands of dollars in expenses for the preparation and defense of its application for fees and for the work done in seeking the enhancement. Further, in the court below, certain testimony indicated that approximately $400,000.00 was spent in correcting time entries. The Bankruptcy Court gave only one award in this regard. It awarded $5 million in fees and $457,443.83 in expenses (*See* ¶ 232). It arguably included in this award fees for the pursuit of the enhancement (*See* ¶ 231). It also awarded fees or expenses which may or may not have included the costs to correct faulty time records. This Court cannot tell how much, if any, fees or expenses incurred to correct inaccurate time entries were included in this final award. Nor can it tell the amount, if any, of fees and expenses that were awarded for the pursuit of the enhancement.

Baker Botts suggested in oral argument that since the Bankruptcy Court ordered less fees and expenses than those sought for the preparation and defense of the fee application that this Court should just presume that no recovery was given for any categories it finds unrecoverable and that it should just affirm the award. While this is mathematically possible and theoretically may be true, this Court cannot engage in such monetary guess work. Therefore, it remands this case back to the Bankruptcy Court for it to elaborate and/or reconsider its award in this regard. It should delete or reform its judgment so as to remove any award of fees and expenses for the pursuit of a fee enhancement. It should also delete all sums awarded, if any, for the recreation of initially inaccurate or insufficient time records.

V. Post-Judgment Interest

Both Reorganized ASARCO and the Plan Administrator object to the award of post-judgment

interest. Given that the Court is remanding this case to the Bankruptcy Court for further elucidation and/or a recalculation and/or further hearings on the issue of fees and expenses, the issue of post-judgment interest is technically moot. Title 28 U.S.C. § 1961 allows for an award of post-judgment interest, but it is virtually a tautology that post-judgment interest by necessity requires a judgment. Given this order, there is no final judgment.

Mindful, however, that the Bankruptcy Court will, with all deliberate speed, resolve the issues necessitated by the remand, this Court feels compelled to address this issue so that it will not necessitate further briefings and so as to maximize judicial efficiency. Appellants argue that an award of post-judgment interest is inappropriate for two reasons: (1) an award of administrative fees authorized by § 330(a) is not a judgment and consequently § 1961 does not apply; and (2) the Reorganization Plan does not allow or provide for interest on these sums. This Court agrees with both positions.

There is no statutory authority which controls this issue and the case law and Rules of Civil Procedure give little more guidance. Section 1961 provides for the award of interest on all civil money judgments. Its exact wording is "on any money judgment in a civil case recovered in a district court." An award of legal fees pursuant to § 330(a) is a payment by the estate of expenses necessary to enable the system to "operate smoothly, efficiently, and expeditiously." H.R. Rep. No. 595, 95th Cong. 1st Sess. 330 reprinted in 1978 U.S. Code Cong. & Ad. News 5963, 6286. That being the case, the award of fees is not a money judgment recovered, but is an order of the Bankruptcy Court to pay certain

expenses. It necessarily follows that since the order awarding fees is not a civil judgment, § 1961 does not apply. *See St. Paul Fire & Marine Insurance Company v. Vaughn*, 779 F.2d 1003 (4th Cir. 1985). Stated more simply, "[s]ection 1961 is inapplicable to the grant of attorneys' fees in a bankruptcy case because attorneys' fees in bankruptcy are an expense of administering the estate and, therefore, do not constitute a money judgment." *In re Comandante Management Co., LLC*, 395 B.R. 807, 818 (D. Puerto Rico 2008).

The Fifth Circuit, in a case involving a claim for interest on a Chapter 7 bankruptcy trustee's compensation and expenses, was called upon to decide whether the interest should begin on the date the bankruptcy petition was filed (the minority view) or whether it should begin to accumulate upon the actual award of the bankruptcy court (the majority view). After reviewing the availing case law in all deciding circuits, the Fifth Circuit rejected both views and held that no interest was due. It reasoned that unlike a payment of interest to a creditor, which is authorized by 11 U.S.C. § 726(a)(5), an administrative expense did not fall into the same category as a pre-petition debt. *In re Reed*, 405 F.3d 338 (5th Cir. 2005). It relied on both a Second Circuit case, *In re Klein Sleep Products Inc.*, 78 F.3d 18 (2d Cir. 1996), and a case of its own, *In re Van Gerpen*, 267 F.3d 453 (5th Cir. 2001), for authority that administrative claims and those made against the estate by creditors are not treated the same. The *Reed* court ultimately held that the trustee and similarly situated professionals are not entitled to interest on claims for fees and expenses. The court concluded:

> To preclude recovery of all interest on a trustee's compensation and administrative expenses is no more

> untenable a result than that reached by the minority view, which reading "allows for interest to accrue on services before they are rendered or expenses before they are incurred." *Reed II*, 312 B.R. at 839.

Id. at 344.

While not entirely on point, the eventual conclusion is the same—administrative expenses, including fees, are not treated like a judgment mandating interest. This Court agrees with this theory and finds it applicable here. Absent some other compelling authority, interest is not statutorily available on administrative expenses.

Reorganized ASARCO and the Plan Administrator also argue that such interest is not available because the Reorganization Plan adopted by this Court does not provide for it—when it specifically provides for and orders interest in other situations to various classes of creditors. *Compare* Art. II, 2.1 *with* Art. IV This is true and the Court also sustains the objection based upon this argument as well.

The Court notes that this does not relieve Reorganized ASARCO or the Plan Administrator from the duty of paying any claims allowed in a prompt manner. Article XIII, 13.8(e) of the plan, provides that a claim that has become allowed (such as those involving administrative expenses) shall be paid "no later than the 10th Business Day after the end of the calendar month in which such Disputed Claim becomes an Allowed Claim." The failure to make such a payment will cause the Plan Administrator to face the consequences that any party would face for failure to comply with a court order.

For these reasons the Court sustains the objections of Reorganized ASARCO and the Plan Administrator to the award of post-judgment interest on the legal fees and

expenses, and instructs the Bankruptcy Court that it should not include such an award in its revised judgment.

VI. Conclusion

This Court affirms the award of the fee enhancement for the services rendered by Baker Botts in the SCC litigation. It reverses and remands the award of the Bankruptcy Court for the fees and expenses awarded for the preparation and defense of the fee application to the extent that it has included in that award fees and expenses to Baker Botts for its pursuit of the enhancement or for any amounts it had to expend to correct its own inaccurate, vague or non-compliant time records. Since the award by the Bankruptcy Court was made in one single amount for fees and one single amount for expenses, this Court cannot determine what sums are recoverable and what sums, if any, are not. Nor can it determine if any of the award has been given for fees or expenses which are not reimbursable. Therefore, this Court remands this case to the Bankruptcy Court so that it can make further findings in this regard. Finally, for the reasons stated above, the award of post-judgment interest cannot stand, and any ultimate award shall be paid pursuant to the Plan of Reorganization. The Order Granting Final Fee Application (Case No. 05-21207, Doc. No. 16334) is reversed and remanded to the Bankruptcy Court for further elucidation consistent with this opinion.

Signed this 8th day of August, 2012.

[Signature]

Andrew S. Hanen
United States District Judge

APPENDIX C

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

Case No. 05-21207
Chapter 11
Jointly Administered

IN RE:

ASARCO LLC, ET AL.
Debtors.

(July 20, 2011)

MEMORANDUM OPINION ON FINAL FEE APPLICATION OF BAKER BOTTS L.L.P.

I. INTRODUCTION

1. On this day came on for consideration the final fee application of Baker Botts L.L.P. filed on February 8, 2010, and supplemented on June 2 and July 7, 2010 (the "*Fee Application*").[1] Baker Botts L.L.P. ("*Baker Botts*"

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[1] *Final Fee Application and Request for Fee Enhancement of Baker Botts L.L.P.*, Dkt. No. 13915 ("*Final Fee Application*"); *Mot. for Leave to Supplement Final Fee Application and Request for Enhancement of Baker Botts L.L.P.*, Dkt. No. 14838; *Second Supple-*

or the "*Firm*") represented ASARCO LLC ("*ASARCO*" or the "*Company*") and its affiliated debtors (the "*Debtors*") in these chapter 11 cases during the period of August 9, 2005, through December 8, 2009 (the "*Application Period*"). The Court, having heard the evidence and arguments of counsel, makes the following findings of fact and conclusions of law.

2. Baker Botts asks the Court to finally approve and allow $135,870,714.58 in fees and $6,046,135.06 in expenses for services performed and expenses incurred by the Firm during the Application Period. The $135,870,714.58 in requested fees is comprised of (1) $113,074,527.74 in fees approved by this Court on an interim basis under section 331 of the Bankruptcy Code and paid to Baker Botts; (2) *plus* $263,994.74 in additional, unpaid fees incurred by Baker Botts for the period of November 1, 2009, through December 8, 2009; (3) *plus* $22,645,119.10 in additional, unpaid fees to compensate Baker Botts for the difference between the hourly rates it charged during the Application Period and the proper hourly rates (20% higher than the rates Baker Botts charged) based on application of section 330 of the Bankruptcy Code and the lodestar analysis; (4) *minus* $112,927.00 in fees charged by Baker Botts to the estates, for which Baker Botts has agreed voluntarily to credit the estates. The $6,046,135.06 in requested expenses is comprised of (1) $6,065,598.58 in expenses approved by this Court on an interim basis under section 331 of the Bankruptcy Code and paid to Baker Botts; (2) *minus* $19,463.52 in expenses charged by Baker Botts to the estates, for which Baker Botts has agreed voluntarily to credit the estates.

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ment to Final Fee Application and Brief in Support ("*Second Supplement*").

3. Baker Botts also asks the Court to finally approve and allow $8,004,920.50 in fees and $457,443.83 in expenses incurred by the Firm in preparing and defending the Fee Application through July 13, 2010. These amounts are comprised of (1) $5,042,001.50 in fees and $199,900.60 in expenses incurred by Baker Botts through July 6, 2010, defending the fees and expenses approved by this Court on an interim basis under section 331 of the Bankruptcy Code and the fees and expenses incurred by Baker Botts from November 1, 2009, through December 8, 2009; (2) $2,684,243.50 in fees and $252,883.23 in expenses incurred by Baker Botts through July 6 defending its request for a 20% increase; (3) $42,845.50 in fees incurred by Baker Botts through July 6 for non-working travel time; and (4) $235,830.00 in fees and $4,660.00 in expenses that Baker Botts estimated it would incur from July 7 through closing argument on the Fee Application on July 13. In addition, Baker Botts asks the Court to include in its final order resolving the Fee Application a provision authorizing the Firm to submit supplemental applications for additional defense fees and expenses incurred after July 13, 2010, upon resolution of any appeals or in connection with any subsequent proceedings in the event of a remand.

4. During the course of these cases, ASARCO, the Debtor in Possession, would from time to time raise questions or concerns regarding Baker Botts' invoices with the responsible attorneys. In each instance, Baker Botts addressed the concerns to the reasonable satisfaction of ASARCO. No party in these cases posed an objection to the interim allowance of Baker Botts' fees and expenses, and ASARCO paid the fees and expenses approved on an interim basis to Baker Botts. Nevertheless, Reorganized ASARCO LLC ("*Reorganized ASARCO*")

has now objected to the final approval and allowance of (1) the fees charged by Baker Botts to the estates during the Application Period, (2) any additional compensation over and above the fees charged by Baker Botts to the estates during the Application Period, and (3) the fees and expenses requested by Baker Botts for the preparation and defense of the Fee Application.[2] Reorganized ASARCO originally objected to the final approval and allowance of the expenses charged by Baker Botts to the estates during the Application Period, but withdrew that objection on June 1, 2010.[3]

5. During the course of these cases, the United States Trustee (the "*U.S. Trustee*") also would from time to time raise questions or concerns regarding Baker Botts' invoices with the responsible attorneys. In each instance, Baker Botts addressed the concerns to the reasonable satisfaction of the U.S. Trustee. The U.S. Trustee did not object to the final approval and allowance of either the fees and expenses charged by Baker Botts to the estates during the Application Period, or the fees and expenses requested by Baker Botts for the preparation and

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[2] *Reorganized ASARCO LLC's Response and Objection to Baker Botts L.L.P.'s Final Fee Application*, Dkt. No. 14118 ("*Original Objection to Final Fee Application*"); *Reorganized ASARCO LLC's Response and Objection to Preliminary and Final Requests for Fee Enhancement of Baker Botts L.L.P.*, Dkt. No. 14119 ("*Objection to Fee Enhancement*"); *Reorganized ASARCO LLC's First Amended Response and Objection to Baker Botts L.L.P.'s Final Fee Application*, Dkt. No. 14713 ("*Amended Objection to Final Fee Application*").

[3] *Original Objection to Final Fee Application*; *Amended Objection to Final Fee Application*; Hr'g Tr. 143:20–24, June 1, 2010 (H. Novosad).

defense of the Fee Application.[4] However, the U.S. Trustee has objected to the final approval and allowance of the 20% increase requested by Baker Botts.[5] The U.S. Trustee contends that if the Court deems any increase proper, the increase should be limited to 5% of the amount of fees charged by Baker Botts to the estates during the Application Period.[6] No other party has objected to the Fee Application.

6. Baker Botts provided adequate notice of the Fee Application and complied with the due process and service requirements of the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, the Parent's plan, and the order confirming the Parent's plan. The Court has considered all objections, briefs, arguments, testimony, and documentary evidence related to the Fee Application. The Court held a final hearing on the Fee Application on May 27 and 28, June 1 and 2, June 18, and July 13, 2010. Baker Botts, Reorganized ASARCO, the U.S. Trustee, and all other interested parties had a full and complete opportunity to be heard by the Court at the final hearing.

7. As detailed below, based upon the record before the Court, the Court finds and concludes that:

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[4] *Original Objection to Final Fee Application*; *Amended Objection to Final Fee Application*; Hr'g Tr. 143:20–24, June 1, 2010 (H. Novosad).

[5] *Corrected Limited Objection of the United States Trustee to the Final Fee Application and Request for Fee Enhancement of Baker Botts L.L.P., Counsel to Debtors*, Dkt. No. 14137.

[6] *Corrected Limited Objection of the United States Trustee to the Final Fee Application and Request for Fee Enhancement of Baker Botts L.L.P., Counsel to Debtors*, Dkt. No. 14137.

- $6,046,135.06 in expenses incurred by Baker Botts during the Application Period were actual, necessary expenses;
- The services summarized in the Fee Application and performed by Baker Botts during the Application Period were substantial and provided a tangible and material benefit to the estates;
- The fees sought by Baker Botts for the services it performed during the Application Period reflect the actual and reasonable billable time expended by Baker Botts during the Application Period in connection with these cases and do not reflect (1) any unnecessary duplication of services, or (2) services that were not (a) reasonably likely to benefit the estates or (b) necessary to the administration of the cases;
- $457,443.83 in expenses incurred by Baker Botts in preparing and defending the Fee Application through July 13, 2010, were actual, necessary expenses;
- The fees sought by Baker Botts for preparing and defending the Fee Application through July 13, 2010, reflect the actual time expended by Baker Botts for preparing and defending the Fee Application. However, the Court finds that the reasonable compensation for the actual, necessary services performed by Baker Botts in preparing and defending the Fee Application through July 13, 2010, is $5,000,000 based on the level and skill reasonably required to prepare and defend the Fee Application.
- In addition to the $113,225,595.48 in fees sought by Baker Botts in its original interim application,

it is entitled to an enhancement of $4,161,708.96 for the extraordinary efforts and results in litigating and obtaining a multi-billion dollar judgment against ASARCO's parent company in the SCC Litigation

8. The Court finally approves and allows $117,613,158.44 in fees and $6,046,135.06 in expenses for services performed and expenses incurred by Baker Botts during the Application Period. The $117,613,158.44 fee award is comprised of (1) $113,074,527.74 in fees approved by this Court on an interim basis under section 331 of the Bankruptcy Code and paid to Baker Botts; (2) *plus* $263,994.74 in additional, unpaid fees incurred by Baker Botts for the period of November 1, 2009, through December 8, 2009; (3) *plus* 4,161,708.96 as an enhancement because there are rare and extraordinary circumstances in these cases and Baker Botts' services were instrumental in producing the exceptional results that were unanticipated at case commencement; (4) *minus* $112,927.00 in fees charged by Baker Botts to the estates, for which Baker Botts has agreed voluntarily to credit the estates. The $6,046,135.06 expense award is comprised of (1) $6,065,598.58 in expenses approved by this Court on an interim basis under section 331 of the Bankruptcy Code and paid to Baker Botts; (2) *minus* $19,463.52 in expenses charged by Baker Botts to the estates, for which Baker Botts has agreed voluntarily to credit the estates.

9. The Court finally approves and allows $5,000,000.00 in fees and $457,443.83 in expenses incurred by Baker Botts in preparing and defending the Fee Application through July 13, 2010. In addition, the Court will include in its final order resolving the Fee Application a provision authorizing Baker Botts to submit supplemental applica-

tions for additional defense fees and expenses incurred after July 13, 2010, upon resolution of any appeals or in connection with any subsequent proceedings in the event of a remand.

II. Background

A. Summary

10. Throughout these bankruptcy cases, Baker Botts lawyers conducted themselves with the utmost professionalism and commitment, addressing an array of challenging legal issues with sophistication, creativity, and skill. Few firms in the country have the breadth and depth of experience in different disciplines necessary to handle these cases with the skill demonstrated by Baker Botts. Baker Botts performed at an exemplary level in a wide spectrum of legal specialties.

11. The results obtained in these cases are nothing short of extraordinary. This Court has said that the ASARCO bankruptcy case "is probably the most successful Chapter 11 of any magnitude in the history of the Code." Baker Botts contributed significantly to the success of these cases. Baker Botts performed in an extraordinary fashion in numerous areas, but perhaps most notably in trying and obtaining a multi-billion-dollar judgment against ASARCO's parent company, Americas Mining Corporation ("*AMC*," and together with ASARCO Incorporated, a Delaware corporation controlled by AMC, the "*Parent*"). Creditors ultimately received payment in full of all claims, plus post-petition interest and allowed attorneys' fees. Such an extraordinary result would have seemed far fetched at the outset of these cases.

12. When ASARCO filed its bankruptcy case on August 9, 2005, "the prospects of reorganization were slim."

"[T]he [C]ompany had essentially run out of cash and was saddled with massive environmental liability, financial debt, potential asbestos-related liability, falling copper prices, and a striking workforce."[7] Creditors were expected to receive cents on the dollar, if anything, because ASARCO's assets were severely depleted and the claims against it were extraordinarily high. Environmental, asbestos, and toxic-tort claims alone were more than $10 billion. The history of this case is well documented in this Court's Recommendation to the District Court on plan confirmation.

13. Baker Botts faced significant hurdles from the outset of these cases. Following ASARCO's bankruptcy filing, all of the Company's prepetition directors and its chief executive officer were forced to resign. ASARCO had little cash, no debtor-in-possession financing, and no financial advisor. It also was in the midst of a labor strike. There was a significant possibility that these chapter 11 cases would be converted to chapter 7 cases and the Debtors would be forced to liquidate, placing professionals like Baker Botts at substantial risk of nonpayment.

14. Baker Botts acted quickly to assist ASARCO in resolving its corporate governance issues, obtaining debtor-in-possession financing, retaining a financial advisor, and settling the strike. Each of these steps was critical to save ASARCO from liquidation and put it on the path toward reorganization.

15. Over the next four years, the Debtors and Baker Botts "continuously moved this case toward the confir-

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[7] *Amended and Supplemental Report and Recommendation for Entry of Findings of Fact and Conclusions of Law on Plan Confirmation*, Dkt. No. 12844 ("*Amended Report and Recommendation*"), at 3.

mation of a plan that resulted in the best possible recovery for creditors—full payment."[8] Baker Botts' outstanding achievements are described below.

16. First, Baker Botts obtained a multi-billion-dollar judgment against AMC relating to the sale of ASARCO's controlling ownership interest in Southern Copper Corporation ("*SCC*"). The judgment obtained by Baker Botts against AMC is likely the largest fraudulent transfer judgment in chapter 11 history.

17. Second, Baker Botts conceived, recommended, and commenced an innovative auction of the multi-billion-dollar judgment against AMC that, under the Debtors' unique plan structure, exposed the Parent to the possibility that it could both lose the Company and have to pay the judgment in full.

18. Third, Baker Botts worked closely with ASARCO and Barclays Capital Inc. ("*Barclays*") to develop and implement a process to auction the Debtors' assets that resulted in the selection of a plan sponsor that vigorously competed with the Parent. When, as a result of the worldwide financial crisis in September and October of 2008, that plan sponsor repudiated the parties' deal, Baker Botts worked closely with ASARCO and Barclays to renegotiate the parties' contract to maintain this critical competition for the Debtors' assets.

19. Fourth, in addition to obtaining a multi-billion-dollar judgment against AMC, Baker Botts litigated and reclaimed the Mission South Mill (the "*South Mill*"), a valuable and important component of ASARCO's mining operations, and prosecuted a complicated tax adversary proceeding, the result of which led to creditors receiving the benefit of an approximately $60 million tax refund.

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[8] *Amended Report and Recommendation*, at 4.

These results increased ASARCO's profitability and made the Company far more attractive to potential buyers and ultimately more valuable to the Parent.

20. Fifth, Baker Botts significantly reduced the claims faced by the Debtors. The United States Department of Justice, Environment and Natural Resources Division (the "*DOJ*"), has described the ASARCO case in a press release as "the largest environmental bankruptcy in U.S. history." Baker Botts, through estimation and settlement resolved billions of dollars in environmental, asbestos, and toxic-tort claims, along with the claims related to the Mission Mine—all on terms favorable to the Debtors. These results liquidated the Debtors' liabilities in a substantially diminished amount and made ASARCO even more desirable to potential buyers.[9]

21. Finally, Baker Botts played a significant role in repairing the severed relationship ASARCO had with its workforce when it assisted the Company in settling the 2005 strike, negotiating a new collective bargaining agreement with the unions, and resolving a number of problems that had arisen in connection with employee benefit and pension plans.

22. During the course of these cases, ASARCO was transformed from a broke and broken company to a reorganized ASARCO, cleansed of its historical liabilities and well-positioned to compete effectively in the world of commerce. Under the guidance of Baker Botts, the

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[9] The Debtors entered bankruptcy with over $10 billion of asserted historical debts. They exited bankruptcy under a confirmed full-payment plan of reorganization with no historical debts other than a one-year $280 million note to a section 524(g) asbestos trust, $200 million of which Reorganized ASARCO prepaid in the first quarter of 2010. Baker Botts Exhibit 71, Grupo Mexico First Quarter 2010 Results, at 5.

Company reformed its corporate governance, dramatically improved its operations, and substantially reduced its liabilities.

23. Baker Botts' expert, retired bankruptcy lawyer Paul Wickes, explained that he is "not aware of a case in which the ultimate result was so much better than what would have been expected at commencement." The Court agrees. ASARCO's bankruptcy is truly a rags-to-riches story.

B. Synopsis of Services Performed by Baker Botts During the Application Period

24. Although the Court will not attempt to describe all the tasks Baker Botts performed during these cases, the Court nonetheless finds it appropriate to highlight some of the significant services that Baker Botts performed during these cases and the extraordinary results achieved in this case.

25. The Baker Botts Fee Application contains a detailed narrative summary of the tasks Baker Botts performed for the Debtors, organized by task code. These tasks were further described by Baker Botts' witnesses. The Court finds that the witnesses that Baker Botts presented at trial were credible, and the Court gives significant weight to their testimony.

26. In the first four months of these bankruptcy cases ASARCO fought its way through a free-fall and precipitous bankruptcy filing, a perilous financial situation, a labor strike, and the perception that the Company was being managed for the benefit of Grupo Mexico rather than in the best interests of the estates. With the advice and assistance of Baker Botts, ASARCO avoided liquidation, and instead laid the ground work for a successful reorganization.

27. Baker Botts successfully negotiated and documented the debtor-in-possession financing notwithstanding the labor strike and the fact that the Company had experienced severe financial distress for several years.

28. On October 15, 2005, after negotiations among the Debtors, lenders, and creditor constituents, the Debtors moved for and obtained court approval, on an interim basis, of a debtor-in-possession facility for up to $20 million provided by CIT.[10] The Court finds that Baker Botts' work in negotiating the debtor-in-possession financing provided a tangible benefit to the estate.

29. With the Court's guidance and the concurrence of Mr. Ruiz—who at that time was ASARCO's only director—Baker Botts negotiated an interim agreement with the USW, which put ASARCO's employees back to work.

30. On December 9, 2005, Baker Botts obtained a Court order mandating the appointment of two independent directors. Ultimately Edward R. Caine and H. Malcolm Lovett, Jr. were appointed to serve as independent directors.

31. In sum, Baker Botts played an important role in the Debtors' resolution of the major obstacles facing them during the first four months of these cases. Baker Botts assisted ASARCO in retaining a financial advisor, obtaining debtor-in-possession financing, settling the strike, and resolving the Company's corporate governance issues.

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[10] *Interim Order Authorizing Post-Petition Financing, Granting Senior Liens and Priority Administrative Expense Status, and Modifying the Automatic Stay*, Dkt. No. 648. This Court approved the financing on a final basis on December 15, 2005. *Final Order Authorizing Post-Petition Financing, Granting Senior Liens and Priority Administrative Expense Status, and Modifying the Automatic Stay*, Dkt. No. 1224.

1. Obtaining a $6 Billion Judgment Against AMC

32. The pivotal event in these cases was Baker Botts' successful prosecution of an action to recover ASARCO's crown jewel—its controlling ownership interest in SCC. When AMC directed ASARCO to transfer the SCC shares to AMC in March 2003, ASARCO was in financial distress and the transfer added insurmountable momentum to ASARCO's spiral into bankruptcy. By the time the SCC lawsuit (the "*SCC Litigation*") went to trial in May 2008, the stock and dividends Baker Botts fought to recover from AMC were worth more than $10 billion.

33. Through its creativity, tenacity, and legal talent, Baker Botts was able quickly and efficiently to prosecute the SCC Litigation, prevail at trial, and obtain and secure a judgment ordering AMC to return to ASARCO stock, dividends, and interest valued in excess of $6 billion at the time of the judgment. The Court finds that the results obtained by Baker Botts in the SCC Litigation are rare and extraordinary and unquestionably provided a tangible and material benefit to the estates. The Court further finds that the extraordinary results achieved by Baker Botts were due to Baker Botts' performance and not to inferior performance by opposing counsel, unanticipated defense concessions, unexpectedly favorable rulings, a sympathetic fact-finder, or simple luck. The Baker Botts trial team won the SCC Litigation by deciphering millions of pages of documents and using those documents to tell a compelling story primarily out of the mouths of adverse witnesses at depositions and in the courtroom. The SCC Litigation is described in detail in the District Court's opinions.[11]

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[11] *See generally ASARCO LLC v. Americas Mining Corp.*, 382 B.R. 49 (S.D. Tex. 2007); *ASARCO LLC v. Americas Mining Corp.*, 396

34. On April 1, 2009, the District Court issued its opinion on damages.[12] The opinion was later amended on April 14, 2009, to correct a clerical error. The District Court ordered AMC to return to ASARCO stock worth approximately $5.48 billion at that time. The District Court also ordered AMC to pay ASARCO money damages of approximately $1.38 billion. The monetary award was comprised of dividends AMC received on the SCC shares of $1.94 billion and prejudgment interest on those dividends of $329 million, less the $747 million that AMC paid for the SCC shares, together with interest on that payment of $164 million.

35. The District Court issued its Final Judgment on April 15, 2009, implementing its liability and damages opinions (the "*SCC Judgment*"). The SCC Judgment obtained by Baker Botts most likely is the largest fraudulent transfer verdict in United States history. Mr. Wickes testified that, based on his experience, "the results obtained in the SCC case are nothing short of remarkable." Reorganized ASARCO's Senior Associate General Counsel Ruth Kern, who testified at the final hearing on the Fee Application on behalf of Reorganized ASARCO, admitted that a $6 billion judgment is a rare result. Reorganized ASARCO's expert witness, Mr. Meckler, similarly testified that the SCC Litigation was "rare" and "extraordinary."[13] The Court agrees.

B.R. 278 (S.D. Tex. 2008); *ASARCO LLC v. Americas Mining Corp.*, 404 B.R. 150 (S.D. Tex. 2009); *ASARCO LLC v. Americas Mining Corp.*, No. 1:07-CV-00018, 2009 WL 2168778 (S.D. Tex. July 20, 2009).

[12] *Amended Report and Recommendation*, ¶ 50.

[13] Reorganized ASARCO's expert on fee enhancement, Judge Monroe, does not contest this. Judge Monroe testified that he was not offering an opinion as to whether the result of the SCC Litigation, or

The results achieved by Baker Botts in the SCC Litigation are, without question, rare and extraordinary measured by any possible standard.

36. The Court finds that, as a result of Baker Botts' efforts before, during, and after the trial in the SCC Litigation, ASARCO's creditors and the bankruptcy estates received perhaps the greatest benefit of these bankruptcy cases in at least two respects. First, the prospect of the return of billions of dollars of value to the estates promised a far more meaningful recovery for creditors than originally anticipated. In fact, this Court found that, given that ASARCO's enterprise value was between $950 million and $1.25 billion at the time of the confirmation hearing in August 2009, the Parent ultimately paid "in excess of $1 billion . for the release [of the SCC Judgment]."[14] The Court reaffirms and reiterates that finding.

37. The Court finds that the initiation of the SCC Litigation, the pursuit of the SCC Judgment, and the SCC Judgment itself brought tangible and material benefit to the estates.

2. Recovering the South Mill at ASARCO's Mission Mine

38. Baker Botts also was instrumental in obtaining the return of what became one of ASARCO's important operating assets: the South Mill.

Baker Botts' work on these cases as a whole, were rare and exceptional.

[14] *Amended Report and Recommendation*, ¶ 193; *see also* Hr'g Tr. 188:20–189:14, June 1, 2010 (J. Lazalde) (admitting that ASARCO was worth around $1 billion in July 2009 and that the Parent paid in excess of $2.4 billion for the Company).

39. The South Mill is one of two mills at ASARCO's Mission Mine in Sahuarita, Pima County, Arizona. The other mill is the Mission North Mill. The South Mill is a wholly functional, fully engineered mill in excellent condition for its intended use. ASARCO had spent $40 million in capital improvements to the mill in 1990 and 1991 to expand its milling capacity to 20,000 tons of ore per day. ASARCO operated the South Mill successfully from 1991 to 2001 in a copper price environment of $0.74 to $1.36 per pound (from 1992 to 2001), but took it out of production when copper prices dropped to $0.65 per pound as of December 31, 2001.

40. Strapped for cash, on July 19, 2005—just three weeks before the bankruptcy filing—ASARCO closed the sale of the South Mill and related equipment, parts, and supplies to Mineral Park. The total sales price was $6 million.

41. The decision to sell the South Mill to Mineral Park was directed by the Parent. Before agreeing to sell the South Mill to Mineral Park, ASARCO conducted no analysis of what the South Mill was worth to ASARCO's ongoing business or how the South Mill could increase ASARCO's cash flow if brought back into production.

42. In September 2006, Mineral Park started dismantling the South Mill. Baker Botts quickly investigated the matter and filed a lawsuit on September 21, 2006, to avoid the sale of the South Mill as a fraudulent transfer and to enjoin further dismantling of the mill.[15]

43. Baker Botts sought and obtained from this Court a temporary restraining order and, after a hearing, a preliminary injunction.

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[15] *See ASARCO's Complaint*, Adv. No. 06-02069, Dkt. No. 1.

44. The key issue in the case was whether Mineral Park had paid reasonably equivalent value for the South Mill at the time of sale. That question turned on whether the income approach could be used to value an asset that was not in operation—a matter of first impression.

45. Baker Botts' successfully defended the injunction in an appeal to the District Court.[16] Shortly thereafter, a settlement was reached and ASARCO retained the South Mill.

46. As a consequence of Baker Botts' efforts, ASARCO avoided spending $40 to $50 million to rebuild the South Mill, and ASARCO was able to retain an income-generating asset that increased revenues and profits for ASARCO. The restarting of the South Mill also lowered the cost per pound of production at the Mission Mine, the Hayden Smelter, and the Amarillo refinery, thereby increasing ASARCO's profitability.

3. Recovering Millions of Dollars of Tax Attributes

47. These cases involved some of the most complex and contentious tax issues of any bankruptcy case in this Court's experience. Despite this, Baker Botts effectively prosecuted a complicated tax adversary proceeding against the Parent, the result of which led to creditors receiving the benefit of an approximately $60 million tax refund.

4. Reducing the Liabilities of the Estates

48. The Court finds that Baker Botts' approach to these cases as a structured, court-supervised negotiation, rather than a platform for protracted litigation of the countless issues that can arise in any bankruptcy case,

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[16] *Order Affirming Bankruptcy Court Order Granting Preliminary Injunction Dated February 5, 2007*, Case No. 2:06-cv-524, Dkt. No. 21.

contributed substantially to the successful results obtained. As Debtors' counsel, Baker Botts was generally successful in developing a consensus among the key creditor constituents to support the Debtors' business or legal strategy. Baker Botts kept constituents informed of the Debtors' intended course of conduct, solicited creditor input, carefully considered their views, and then explained and provided, as appropriate, the analytical underpinning of the Debtors' decisions. There were many more hours spent at the negotiating table than in court.

49. Examples of consensus among the Debtors and their creditor constituents abound, including the agreements reached regarding the debtor-in-possession financing, the approval of the collective bargaining agreement, the plan sponsor selection process, and, finally, the confirmation hearing itself at which there was overwhelming creditor support for the Debtors' plan. However, the best examples of successful negotiations among the Debtors and the creditor constituents are the court-approved settlements of the Debtors' environmental, asbestos, toxic-tort, and Mission Mine liabilities. The Debtors' exposure to these claims was substantial and would have taken decades and hundreds of millions of dollars in professional fees to resolve in the tort system or in the context of an administrative proceeding (as was the case for the Mission Mine liabilities). Baker Botts developed and deployed innovative legal strategies that enabled the Debtors to settle over $10 billion of environmental, asbestos, toxic-tort, and Mission Mine claims in less than five years and on a cost-effective basis. The Court finds that Baker Botts' efforts with respect to ASARCO's most significant liabilities, and the results achieved by the Firm, provided tangible benefit to the estate. Baker Botts' work decreased ASARCO's liabili-

ties and made the Company more desirable to potential buyers and ultimately more valuable to the Parent.

5. Resolving the Environmental Liabilities

50. At the outset of these cases, ASARCO faced billions of dollars of environmental liabilities at approximately 100 sites in seventeen different states and six regions of the Environmental Protection Agency (the "*EPA*") involving many of the largest, oldest, and most complex Superfund sites in the country, including the two largest—Coeur d'Alene and Tri-States. Because resolution of the environmental claims outside of bankruptcy would have taken many years and perhaps decades, Baker Botts recommended that the Debtors seek to estimate them under section 502(c) of the Bankruptcy Code. However, only a handful of bankruptcy courts had actually estimated environmental claims prior to these cases, and none had undertaken estimation of environmental liabilities on such a large scale. The number and amounts of the claims, the large number of diverse sites, and the plethora of difficult issues posed a daunting challenge.

51. Baker Botts' accomplishments in the environmental aspect of the bankruptcy were outstanding. ASARCO faced staggering claims for billions of dollars of alleged environmental harm substantiated by credible experts, many of whom had spent decades or their entire careers studying the disputed sites. For each site, Baker Botts faced a shifting array of interests and demands from various governments, potentially responsible parties ("*PRPs*"), and constituencies. To resolve these claims in a timely manner—thereby allowing the Company to promptly reorganize—Baker Botts negotiated a creative case management order (the "*CMO*") that provided for the estimation of approximately $6 billion of claims at

twenty-one sites, involved dozens of parties, and required those estimation proceedings to be conducted and concluded in an expedited time frame. Baker Botts then executed the tasks contemplated by the CMO by assigning teams of highly proficient bankruptcy and environmental lawyers to each of the sites and requiring these teams, as well the other parties to the estimation proceedings, to meet the demanding schedule for discovery, third-party mediation, and actual estimation hearings, all as contemplated by the CMO. Baker Botts settled or tried all claims at the sites covered by the CMO within the timeframe allowed. Ultimately, Baker Botts managed to craft a "global environmental settlement" that resolved billions of dollars of environmental liabilities. And the Firm did it in a demanding, compressed time frame.

52. The Court finds that the global environmental settlement was of substantial material benefit to the estates, and that Baker Botts' superior performance in obtaining the settlement and gaining the Court's approval of the same provided a tangible benefit to the estates.

6. Implementing the Global Environmental Settlement

53. Another excellent feature of Baker Botts' work was addressing the difficulties inherent in the large numbers of property transactions that underpinned the settlement agreements and trusts that were necessary for the global environmental settlement.

54. Baker Botts established custodial trusts that resolved ASARCO's liabilities at the properties to be transferred to the trusts. Baker Botts again faced numerous legal and logistical challenges in the transfer of these properties. Included in these challenges was incorporating twenty-seven designated properties, located in four-

teen states, each with different legal obligations and liabilities to be addressed.

55. There were several months of negotiations with the federal and state agencies aimed at releasing ASARCO from these liabilities and establishing the terms and funding for custodial trusts. Ultimately, the Baker Botts team reached a deal with the governments to release ASARCO of the liabilities at these certain properties in exchange for funding a trust that would take ownership of the properties.

7. **Resolving the Asbestos Liabilities**

56. Another significant factor contributing to the Debtors' need to reorganize was their exposure to asbestos liability. Before their bankruptcy filings, approximately 195,600 asbestos claims had been filed against ASARCO or its subsidiaries. While about half of these claims had been settled, the Company was still facing 20,000 claimants with unfunded settlements and about 67,000 pending claims.

57. Resolution of the Debtors' asbestos liability was a critical path to their exit from bankruptcy. Without this resolution and a section 524(g) channeling injunction, the Debtors faced the prospect of litigating thousands of prepetition asbestos claims and an unknown number of future claims in jury trials across the nation, and proving feasibility of any plan of reorganization would have been a significant challenge for any plan proponent.

58. The task of resolving the asbestos claims and future demands was not an easy one, but, drawing on its previous experience with asbestos and bankruptcy matters, Baker Botts developed creative strategies for addressing these claims and demands and successfully assisted the Company in resolving its alleged asbestos lia-

bility in a timely and cost-effective manner. Among the creative strategies that Baker Botts developed was an innovative asbestos bar date process to obtain detailed claims information without expensive and prolonged discovery. The process facilitated direct communications among the experts and consultants for the major constituencies and provided the factual basis from which substantive negotiations could proceed.

59. In large part due to the efforts of Baker Botts, the Debtors were able to settle all asbestos claims and demands for a present value of $912.3 million under the Parent's plan—almost $1.2 billion less than the asbestos claimants' experts' estimate of the Subsidiary Debtors' asbestos liability alone. The Court finds that the services that Baker Botts performed with respect to the Debtors' alleged asbestos liabilities were excellent, allowed the Debtors to emerge from bankruptcy free from all asbestos liabilities in a timely and cost-effective manner, and provided a tangible and material benefit to the estates.

8. **Resolving the Toxic-Tort Liabilities**

60. In addition to its staggering environmental and asbestos liability exposure, ASARCO was burdened by 1,380 toxic-tort claims in the aggregate amount of $1.47 billion, excluding claims filed in an undetermined amount. Further complicating matters was the problem that individuals asserting such claims suffered from serious diseases and health impairments (*e.g.*, children exposed to lead and arsenic). Despite these obstacles, Baker Botts encouraged claimants to settle rather than to litigate. With the assistance of Baker Botts, ASARCO successfully settled substantially all of the toxic-tort claims for approximately $35 million—an outcome that, at the beginning of these cases, seemed impossible. By the commencement of the confirmation hearing, all but two of the

remaining claims were either settled or disallowed. The Court finds that Baker Botts demonstrated excellent wisdom and skill in negotiating these settlements, without which the Company undoubtedly would have incurred significant costs and expended valuable resources in litigation with no assurance of success.

61. The Court finds that Baker Botts' work on the Debtors' toxic-tort claims was a successful and efficient resolution of complex personal injury claims that otherwise would have taken years, if not decades, to resolve in the tort system at a significantly greater cost to the Debtors and their estates. Baker Botts' services with respect to toxic-tort claims provided tangible and material benefit to the estates.

9. Resolving the Mission Mine Liabilities

62. Central to ASARCO's ability to emerge from chapter 11 as a viable mining company was the Company's ability to continue mining copper at its Mission Mine. After hard-fought negotiations complicated by distrust for the Company and Grupo Mexico, Baker Botts successfully resolved the claims relating to the Mission Mine for only $30 million in contrast to the estimates of the claimants of between $69 million and $1 billion, and ASARCO was permitted to continue mining copper at its Mission Mine.

63. The Court finds that the Mission Mine Settlement provided tangible and material benefit to the estates.

10. Resolving Labor and Employee Benefit Issues

64. From the beginning of these cases until their conclusion, ASARCO has had a troubled relationship with its workforce and labor unions. Baker Botts played a significant role in repairing this severed relationship when it assisted the Company in negotiating a new collective

bargaining agreement with the unions and resolving problems that had arisen in connection with employee benefit plans and pensions. In 2006, Baker Botts worked closely with ASARCO's new President and Chief Executive Officer, Joseph Lapinsky, as he negotiated with the labor representatives on the terms of a definitive collective bargaining agreement. ASARCO, again with the assistance of Baker Botts, also addressed settlement of the retiree medical class action suit filed in the United States District Court for the District of Arizona. The collective bargaining agreement that Baker Botts helped to bring about "was critical to a successful reorganization and assisted in the Debtor[s] being in position to generate $1.4 billion in cash that ma[de] both the Debtor's Plan and the Parent's Plan possible."[17]

65. In addition to the labor strike, ASARCO, under the control of the Parent, had also allowed many of the employee benefit plans to languish to the point that many of them no longer complied with applicable law and ran the substantial risk of being terminated. Baker Botts' efforts were crucial to getting these issues resolved and the plans back into compliance because ASARCO otherwise lacked the resources, personnel, or expertise to do so independently.

66. ASARCO also had to address issues regarding the adequate funding of its pension plans during the course of these cases, which Baker Botts expended significant time and energy in addressing on ASARCO's behalf.

67. The Court finds that Baker Botts' efforts with respect to labor, employee benefits, and pension matters contributed to the stable workforce that enabled ASARCO to generate approximately $1.4 billion in cash,

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[17] *Amended Report and Recommendation*, ¶ 15.

which ultimately was distributed to creditors under the Parent's plan. The Court finds that Baker Botts' superior performance with respect to labor and employee benefits and pension issues provided tangible and material benefit to the estates.

11. Creating Competition for the Assets of the Estates

68. Throughout these cases, Baker Botts encouraged ASARCO to adopt a strategy of creating a competitive environment for the control of the Company's assets to maximize the value of the estates and the return to creditors. Competition was necessary to encourage the Parent to put forth a full-payment plan. The benefits of competition accrued to the estates by providing more and better creditor options, maximizing the value of the Debtors' estates, and presenting for confirmation two confirmable full-payment plans.

69. The Court finds that Baker Botts' efforts to create competition for the assets of the estates were outstanding and provided tangible and material benefit to the estates.

12. Securing Sterlite as the Plan Sponsor

70. Baker Botts worked closely and effectively with ASARCO and Lehman Brothers to develop and implement an auction process that resulted in the selection of a plan sponsor that vigorously competed with the Parent. By securing Sterlite as a plan sponsor and later encouraging ASARCO to both evaluate alternatives to a Sterlite-sponsored plan and to keep Sterlite engaged in the auction process, Baker Botts provided a tangible and material benefit to the estates.

71. On March 6, 2009, the Debtors entered into a new purchase and sale agreement with Sterlite. Pursuant to the terms of the New Sterlite PSA, Sterlite would obtain

a release from ASARCO's breach of contract claim against it only if Sterlite successfully purchased the Company. Because the Parent's plan was ultimately confirmed, ASARCO delivered to the Parent at closing a $50 million deposit and the breach of contract claim against Sterlite—a claim Reorganized ASARCO is now pursuing.

72. The renegotiated contract with Sterlite and the threat of the litigation against it if it did not win the Company kept Sterlite competing with the Parent, contributed to the competitive bidding process at confirmation and ultimately to two full-payment plans.

13. Maintaining Competition During Plan Confirmation

73. This Court previously noted the effect of competition on the Parent when it explained that, "[t]hroughout this case, the Parent has proposed and withdrawn many plans. On numerous occasions, attorneys for the Parent suggested that the Parent would propose a full payment plan. However, the history of this case demonstrates that all of the Parent's plans were proposed in reaction to other plans, tactically designed to regain control of the Debtor during this case or as an effort to limit liability in the SCC Litigation."[18]

74. Baker Botts analyzed the numerous changes to the Parent's plan and evolving deal terms, conducted necessary discovery at an accelerated pace before and during confirmation. Baker Botts identified and forced the Parent to close loopholes and walk-away rights and to solidify its funding and escrow agreement as part of a competitive bidding process.

75. Throughout the confirmation hearing, Baker Botts continued to negotiate with Sterlite to improve the

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[18] *Amended Report and Recommendation*, at 5.

Debtors' plan, and four amendments to the plan were filed during the course of the confirmation hearing. The Debtors' improvement to their plan pressured the Parent to improve its plan, resulting in six plan amendments from the Parent after the commencement of the confirmation hearing.

76. The Debtors' plan on which the creditors voted provided for a distribution to creditors of $1.1 billion cash, a $770 million nine-year, non-interest-bearing note, and litigation trust interests in the SCC Judgment. The Parent's plan on which creditors voted proposed a $1.4625 billion cash distribution plus an additional $280 million note to the asbestos trust. Baker Botts encouraged Sterlite to increase the cash consideration and to monetize the non-cash consideration under the Debtors' plan such as the SCC Litigation trust interests. By the end of confirmation, Sterlite had contractually agreed to buy the interests in the SCC Litigation Trust that would otherwise have been distributed to creditors under the Debtors' plan for a total of $1.1515 billion. In response to this competitive pressure, the Parent increased its cash consideration and improved the terms of its plan by way of six amendments. However, creditors voted overwhelmingly in favor of the Debtors' plan.[19]

77. By the conclusion of the confirmation hearing, the Debtors' plan provided for $2.272 billion cash in aggregate consideration (subject to additional contributions if necessary for claims to be paid in full), and the Parent's plan proposed $2.4801 billion cash in aggregate consideration (subject to the return of cash in excess of the amount necessary for claims to be paid in full).

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[19] *Amended Report and Recommendation*, at 7.

78. This Court entered its report and recommendation in favor of the Parent's plan on August 31, 2009. Sterlite offered to improve its offer under the New Sterlite PSA, thereby improving the Debtors' plan. Because Sterlite's presence in these cases had always incentivized the Parent, Barclays recommended that the Debtors keep Sterlite as an available alternative. Sterlite agreed to waive its right to terminate the New Sterlite PSA (Sterlite had a termination right if this Court failed to recommend the Debtors' plan for confirmation), and to allow the Debtors to prepare for a closing with the Parent, but only if the Debtors objected to the report and recommendation.

79. The Court finds that it was reasonable for the Debtors and its advisors to believe that copper price volatility could impede financing under the Parent's plan. It also was reasonable for them to believe that the Parent might have devised a strategy before closing if it became necessary or desirable for the Parent to avoid or delay a closing. After careful consideration and deliberation, the Board decided to object to the report and recommendation on certain limited discrete issues, provided Sterlite would stipulate that the Company and its advisors could and would prepare for a prompt closing of the Parent's plan if and when confirmed.

80. The District Court entered its confirmation order in favor of the Parent's plan on November 13, 2009. The Debtors, aided by Baker Botts, worked diligently and professionally to prepare for a prompt closing of the Parent's plan. Copper prices held, the Parent obtained its financing, the plan closed on December 9, 2009, and the creditors were paid in full.

81. The Court finds that Baker Botts' efforts before and during confirmation not only benefitted the Debtors

and their creditors but the Parent and Grupo Mexico as well. Not only did Grupo Mexico retain its indirect ownership of ASARCO, but it received a company cleansed of its liabilities and well positioned to compete in the world of commerce. At closing, ASARCO received the benefit of the $50 million Sterlite deposit, a breach of contract claim against Sterlite that it is pursuing, and a refund from the Plan Administrator of approximately $70 million. Grupo Mexico has advertised the benefits it has received from the ASARCO bankruptcy and reorganization. Baker Botts Exhibits 70 and 71 are Grupo Mexico's Fourth Quarter Results 2009 and First Quarter Results 2010 that are published on its website (http://www.gmexico.com/financial/en-fi00.asp). Extracts from those reports follow:

- The restructuring of Asarco was successfully concluded in December, consolidating once again as a subsidiary of [Grupo Mexico] completely free of any environmental and asbestos related contingencies and liabilities. With the integration of Asarco, [Grupo Mexico] positions itself as the number one company in copper reserves worldwide and reaffirms its position as one of the main producers of mined and refined copper.
- Asarco contributed US$1.357 billion from its own cash and made payment to its creditors for an aggregate cash consideration of US$3.562 billion.
- Tax Benefits of US$1.024 billion. [Grupo Mexico's] investment in the reorganization of Asarco generated a fiscal benefit of US$1.024 billion to be realized in the following quarters. Taking this benefit into account, the net transaction cost was US$1,181 million. At the average copper price of US$3.25 per pound estimated by analysts for 2010,

Asarco will generate an EBITDA of approximately US$550 million in 2010, implying for the transaction a very attractive valuation of 2.1 times EBITDA.

- Consolidated sales for 1Q10 were US$1.933 billion compared to US$851 million for 1Q09, an increase of 127% mainly due to greater production by the Mining Division through the recovery of Asarco and higher metal prices.

82. Grupo Mexico's overall net cash position has significantly improved following the ASARCO acquisition, allowing Grupo Mexico to prepay its debt and reward its stockholders with at least two cash dividends. During the first quarter of 2010, "prepayments were made on the AMC loan and the ASARCO note for a total of US$500 million." Additionally, "[o]n January 29, 2010, the Board of Directors approved a dividend payment of $0.14 pesos per outstanding share," which equates to a total dividend of $83,594,131.[20] "On April 23, 2010, the Board of Directors approved a dividend payment in cash of $0.17 pesos per outstanding share," which equates to a total dividend of $108,599,660.[21] The Court finds that Grupo Mexico benefitted from the superior performance of Baker Botts in representing ASARCO in these cases.

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[20] This amount was calculated as of January 29, 2010, at which time there were 7,785,000,000 shares outstanding and the conversion factor was 0.0766989.

[21] This amount was calculated as of April 23, 2010, at which time there were 7,785,000,000 shares outstanding and the conversion factor was 0.082058.

III. DISCUSSION

A. Section 330 of the Bankruptcy Code

83. Section 330 of the Bankruptcy Code governs the award of fees and expenses for professionals retained under section 327 of the Bankruptcy Code. Section 330 of the Bankruptcy Code "authorizes compensation for services and reimbursement of expenses of officers of the estate," and "prescribes the standards on which the amount of compensation is to be determined."[22] Section 330 provides that a bankruptcy court, in its discretion, determines "the amount of reasonable compensation" for professionals retained under section 327 of the Bankruptcy Code.[23]

84. Section 330 provides considerable guidance to bankruptcy courts in determining reasonable compensation. It provides:

> (3) In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;

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[22] H.R. Rep. No. 95-595, at 329 (1977); *see also Chamberlain v. Kula (In re Kula)*, 213 B.R. 729, 736 (B.A.P. 8th Cir. 1997) ("Section 330 applies to all bankruptcy cases, including Chapter 11 cases.").

[23] 11 U.S.C. § 330(a)(3); *see In re Farah*, 141 B.R. 920, 923 (Bankr. W.D. Tex. 1992) ("Determining what constitutes reasonable compensation is soundly within the discretion of the bankruptcy court, primarily because the bankruptcy judge is in the best position to determine the reasonableness of a proposed fee.").

> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and
>
> (E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.[24]

This list is non-exclusive.[25]

1. Application of the Statutory Factors Listed in Section 330 of the Bankruptcy Code

a. Time Spent on Services

85. Courts may determine the reasonable amount of time a professional should spend on a given project.[26] In

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[24] 11 U.S.C. § 330(a)(3). Section 330(a)(3) was amended by the Bankruptcy Abuse Prevention and Consumer Protection Act in 2005. The amendment to section 330(a)(3) is effective for all title 11 cases filed after October 17, 2005. The ASARCO bankruptcy case was filed prior to that date. The amendment to section 330(a)(3) added an additional statutory factor for courts to consider in determining reasonable compensation: with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field. 11 U.S.C. § 330(a)(3). Even if the amendment to section 330(a)(3) governed these cases, the Court concludes that Baker Botts has demonstrated skill and experience in the bankruptcy field. Baker Botts' proffers and the Court's first-hand experience presiding over these cases support this conclusion.

[25] *See Staiano v. Cain (In re Lan Assocs. XI, L.P.)*, 192 F.3d 109, 123 (3d Cir. 1999) ("[T]he factors set forth in § 330(a) are not exhaustive and . . . bankruptcy courts may consider relevant factors beyond those listed in the statute.").

making such determination, the Court may take into account the complexity of the legal issues for which the services were performed.[27] A fee applicant should also demonstrate good faith "billing judgment."[28]

86. The Court finds that Baker Botts spent a total of 319,860.85 hours of professional time during the Application Period.

87. Baker Botts firm policy requires timekeepers to record their hours contemporaneously with the work they perform, or as soon thereafter as reasonably possible, recognizing the vagaries and demands of the practice. Baker Botts lawyers are to accurately describe the work performed, and record all of their time but "not a minute more." The Court has no reason to doubt that any attorney who worked on these cases performed as efficiently and as diligently as he or she reasonably could under the circumstances.

88. In terms of complexity and novel issues, few if any chapter 11 cases in United States history rival these cases.

89. The amount of time that Baker Botts spent securing the SCC Judgment; developing the innovative auction of the SCC Judgment; addressing the Debtors' environmental, asbestos, and toxic-tort liability; addressing the Debtors' cash-flow deficiencies in the early stages of these cases; participating in the resolution of disputes between ASARCO and the labor unions and work on the Debtors' employee benefits issues; addressing ASARCO's corporate governance issues; identifying and

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[26] *In re Wildman*, 72 B.R. 700, 713 (Bankr. N.D. Ill. 1987).

[27] *See Frazin v. Haynes & Boone LLP (In re Frazin)*, 413 B.R. 378, 424 (Bankr. N.D. Tex. 2009).

[28] *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

securing Sterlite as the plan sponsor; seeking confirmation of the Debtors' plans of reorganization and responding to other plan sponsors' plans of reorganizations; maintaining competition among the plan sponsors in these cases; and performing other services that counsel for debtors-in-possession routinely perform in chapter 11 cases was reasonable and fully compensable.

90. The Court concludes that Baker Botts exercised good faith billing judgment during these cases, Baker Botts staffed these cases properly under the circumstances, the work was performed efficiently and consistent with high standards, and the time Baker Botts spent on the services it performed for the Debtors during the Application Period was reasonable and fully compensable.

b. **Rates Charged for Services**

91. Courts take a number of different factors into account when reviewing the rates charged by a fee applicant, including (1) the customary compensation charged by comparably skilled professionals;[29] (2) the novelty and complexity of the issues, the special skill and experience of counsel, the quality of the representation, the results obtained, and the superior performance of counsel;[30] (3) the lack of objection to the rate charged;[31] (4) the type

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[29] *See, e.g., Pal Family Credit Co. v. County of Albany (In re Pal Family Credit Co., Inc.)*, 425 B.R. 1, 9 (N.D.N.Y. 2010); *see also In re Berg*, 05-39380, 2008 WL 2857959, at *5 (Bankr. E.D. Pa. July 21, 2008) (taking into account the experience and skill of the professionals in the case, the market cost for a professional with such experience and skill, and the applicant's normal billing rate).

[30] *In re Tan, Lie Hung & Mountain States Inv., LLC*, 413 B.R. 851, 862 n.23 (Bankr. D. Or. 2009).

[31] *In re Moss*, 320 B.R. 143, 157 (Bankr. E.D. Mich. 2005).

of services performed;[32] (5) the bankruptcy court's own experience with the rates charged by other fee applicants;[33] and (6) whether the applicant charges more for bankruptcy services than for non-bankruptcy services.[34] In addition, courts will analyze what the prevailing market rate is for similar work in connection with a lodestar analysis.[35]

92. The Court concludes that consideration of the novelty and complexity of these cases, the results obtained, and the rates charged by comparably skilled attorneys in other large chapter 11 cases is more appropriate when determining the prevailing market rate under the lodestar analysis.

93. The Court finds that no other firm could have achieved the results in these cases at the rates charged by Baker Botts. Baker Botts presented unrebutted evidence to support this finding. Baker Botts' expert, Paul Wickes, testified that Baker Botts was one of a select few law firms that could have achieved the results obtained in these cases. Mr. Wickes further testified that none of the other firms capable of achieving the results obtained in these cases would have been "prepared to take [these cases] for a blended hourly rate of anything close to the $354 per hour that Baker Botts has charged and would have instead insisted on a blended hourly rate more in the range of that charged by [the Parent's counsel] Milbank." Mr. Wickes even admitted that his former firm, Linklaters, would not have been able to handle these cas-

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[32] *In re Busy Beaver Bldg. Centers, Inc.*, 19 F.3d 833, 849 (3rd Cir. 1994).

[33] *In re Allegheny Int'l, Inc.*, 139 B.R. 336, 339 (Bankr. W.D. Penn. 1992).

[34] *In re Fleming Cos., Inc.*, 304 B.R. 85, 92–93 (Bankr. D. Del. 2003).

[35] *See, e.g., In re Atwell*, 148 B.R. 483, 489 (Bankr. W.D. Ky. 1993).

es. Mr. Kinzie testified that while there might be a handful of firms that could have represented ASARCO successfully, it is unlikely any of those firms could have done so for less than $200 million. The Court agrees.

c. **Baker Botts' Hourly Rates**

94. For the period 2005 through 2009, Baker Botts billed ASARCO at the standard rates that Baker Botts had in place for each of those years. The rates that Baker Botts charged to ASARCO are the same or lower than they would have been in a non-bankruptcy matter of similar size and complexity.

95. The standard rates that Baker Botts charged during these cases are generally lower than those charged by Baker Botts' competitors. Baker Botts sets its standard rates at the lower end of the range of rates relative to most of the firms that Baker Botts considers its primary competitors. Baker Botts' average standard rates are generally 9% to 14% lower than competitor firms headquartered outside New York or California, and 7% to 11% lower than other large Texas firms.

96. In part because Baker Botts' rates are relatively modest compared to the firms with which it primarily competes, but also because of the Firm's billing practices, the quality of its lawyers, and the sophistication of its practice, Baker Botts sets standard rates but then bills or collects at or above the Firm's standard rates. Between 2005 and 2009, 58% of the time that Baker Botts billed to its clients was at or above its standard rates. Of the 58%, 42% was billed at standard rates and more than 16% was billed at premium rates (*i.e.*, rates above standard). For this period of time, Baker Botts' premium fees as a percentage of standard fees ranged from approximately 13% to 19%. The work for ASARCO represented 3.9% of Baker Botts' overall standard work value during

the years 2005 through 2009. If the time worked on behalf of ASARCO is removed from this analysis, the result is that over 56% of the remaining work was billed at or above Baker Botts' standard rates. The average percentage of the work billed at premium rates rises to 17%.

97. Billing and collecting premium rates is part of Baker Botts' billing practice and a material component of the Firm's revenues. While Baker Botts' average rates are at the lower end of the spectrum relative to its primary competitors, between 15% and 20% of the Firm's production is billed at a premium to standard rates (an average of approximately 16% in years 2005 to 2009). Premiums are billed and collected by Baker Botts for several reasons, but in general Baker Botts' clients agree to pay a premium because of the exceptional effort, significant result, or specialized skill of the Baker Botts lawyers involved in the representation.

98. For all Baker Botts timekeepers that worked on these cases during the years 2005 through 2009, work on these cases represented 10% of the total time billed to all clients. For these same timekeepers and time period, of the 90% of their hours billed to other clients, 79% of their hours were billed at or above Baker Botts' standard rates.

99. During 2005 through 2009, it was Baker Botts' typical practice to invoice most of its time to clients at or above Baker Botts' standard rates with very little write down at the time of invoicing. Baker Botts' clients typically pay Baker Botts' invoices on a timely basis, which averages from fifty to fifty-two days. ASARCO's payment cycle average was approximately forty-nine days during the period 2005 through 2009.

100. The Court finds that the possibility of receiving premium rates based on extraordinary circumstances is

an important consideration of Baker Botts in setting its standard rates. The Court further finds that, when Baker Botts set its standard rates in these cases, bankruptcy professionals had a reasonable expectation that they could receive an increase to their standard rates based on results obtained if the Court determined the circumstances warranted.

d. **Comparison of Baker Botts' Hourly Rates to Others**

101. The Court finds that the hourly rates that Baker Botts charged in these cases were low when compared to (1) the rates other law firms charged representing debtors in other chapter 11 cases as well as the rates that law firms participating in these cases charged in other chapter 11 cases representing debtors and official creditor committees; (2) the rates that law firms representing debtors charged in chapter 11 cases filed in Corpus Christi, Dallas, Houston, and San Antonio; and (3) the rates that other professionals charged in these cases.

i. Comparison of Baker Botts' Rates to Rates Charged in Other Chapter 11 Cases

102. The Court finds that the average hourly rate that Baker Botts charged in these cases was substantially lower than rates charged by other firms in other large, complex chapter 11 cases pending during the same time as these cases. To reach this finding, the Court considered the rates charged in other cases that were derived from the following sources: (1) the top five bankruptcy cases reported on www.bankruptcydata.com for every year from 2005 through 2009; (2) all cases listed on Exhibit B to Barclays' motion for allowance of fee enhancement; (3) cases where Milbank, Tweed, Hadley & McCloy, Haynes and Boone, LLP, Vinson & Elkins LLP, Shearman & Sterling LLP, Kramer Levin Naftalis &

Frankel LLP, Gibson, Dunn & Crutcher LLP, and Latham & Watkins, LLP (each of whom participated in these cases) were counsel to a debtor or official creditors committee; and (4) various chapter 11 cases filed in Texas from 2005 through 2009. The chart attached hereto as exhibit 1 shows comparison of Baker Botts rates with other chapter 11 cases.

103. The hourly rate of Baker Botts' highest billing-rate partner was lower than the hourly rate of the highest billing-rate partners in several other bankruptcy cases that were pending from 2005 through 2009. The chart attached hereto as exhibit 2 shows a comparison of Baker Botts partners with partners in other chapter 11 cases.

104. The hourly rate of Baker Botts' associates was lower than the hourly rate of the associates in several other bankruptcy cases that were pending from 2005 through 2009. The chart attached hereto as exhibit 3 compares the highest rates of second-, fourth-, and eighth-year associates at Baker Botts to the highest rates of associates at the same level in other national bankruptcy cases. The highest associate rates of Milbank and Haynes and Boone in these cases are also included in this chart.

ii. **Comparison of Baker Botts' Rates to Rates Charged in Other Bankruptcy Cases Pending in Texas**

105. The average hourly rate that Baker Botts charged in these cases was lower than the rates charged by comparable firms in other bankruptcy cases pending in Corpus Christi, Dallas, Houston, and San Antonio from 2006 through 2009. The chart attached hereto as exhibit 4 shows the average rates charged in Texas bankruptcy cases.

iii. Comparison of Baker Botts' Rates to Rates Other Professionals Charged in these Cases

106. The average hourly rate for all professionals that Baker Botts charged over the course of these cases was $353.98, which is substantially lower than rates charged by other firms in these cases. This is true even taking into account that Milbank reduced its rates for partners beginning November 2008 and took an additional $4 million voluntary reduction, and taking into account Haynes and Boone's 10% discount for all timekeepers beginning January 1, 2009.

AVERAGE RATES OF FIRMS INVOLVED IN THESE BANKRUPTCY CASES	
Milbank	$482.84 (36.4% higher than Baker Botts)
Jordan Hyden	$434.00 (22.6% higher than Baker Botts)
Reed Smith	$417.00 (17.8% higher than Baker Botts)
Haynes and Boone (not discounted)	$415.86 (17.5% higher than Baker Botts)
Haynes and Boone	$397.97 (12.4% higher than Baker Botts)
Baker Botts	**$353.98**

107. The hourly rates of ten Milbank partners were at least 20% higher than Baker Botts' highest hourly rates during these cases. Milbank discounted its hourly rates for its partners beginning in November 2008, but its partners' hourly rates were still substantially higher than Baker Botts' partners even in 2009. The chart attached

hereto as exhibit 5 shows a comparison of Milbank's highest rates with Baker Botts' highest rates.

108. The range of rates Baker Botts charged during the Application Period was $365-$800 per hour for partners, $195-$525 per hour for associates, and $50-$250 per hour for paraprofessionals. Baker Botts did not charge a higher rate for its bankruptcy professionals than its non-bankruptcy professionals. The majority of Baker Botts' timekeepers billing to these cases were non-bankruptcy lawyers. Exhibit C to the Fee Application reflects that Baker Botts does not charge more for a particular service, including bankruptcy work.

109. Baker Botts has cultivated an impressive legal record since its founding in 1840. The Firm has demonstrated excellence in a variety of fields and is widely regarded as one of the country's most prestigious law firms. Moreover, the Firm, and Mr. Kinzie in particular, has specialized knowledge of section 524(g) bankruptcies in which a debtor has massive asbestos liability. Baker Botts also has garnered impressive litigation results, including the largest unreversed judgment in United States history in the *Pennzoil v. Texaco* case. Mr. Terrell, who was the lead trial lawyer in the SCC Litigation, was one of the lead lawyers in the *Pennzoil* case.

110. The rates that Baker Botts charged are comparable to or lower than the rates charged in these chapter 11 cases by other professionals paid by the estates. Also, based on this Court's experience with fee applications in this Court, the rates that Baker Botts charged to the Debtors as interim fees under section 331 are not unreasonable. Moreover, Reorganized ASARCO did not object to the hourly rate that any Baker Botts attorney charged

in these cases.[36] Accordingly, the Court holds that the hourly rates that Baker Botts charged for all professionals and paraprofessionals during the Application Period are not unreasonably high and are fully compensable. However, the Court also holds that Baker Botts' hourly rate is approximately 20% lower than an appropriate market rate.

e. **Necessary or Beneficial to the Estates**

111. In *Andrews & Kurth, LLP v. Family Snacks, Inc. (In re Pro-Snax Distribs., Inc.)*, 157 F.3d 414, 426 (5th Cir. 1998) ("*Pro-Snax*"), the Fifth Circuit held that work performed by legal counsel on behalf of a debtor must be of material benefit to the estate. The *Pro-Snax* standard does not, however, require unbridled success. An estate may benefit from first tries, mixed results, and even failures that lay the groundwork for future progress. *Pro-Snax* does not require denial of compensation that is rightfully earned by second-guessing reasonable decisions that ultimately advanced the case. While the Parent argues that *Pro-Snax* requires a court find from hindsight that each action taken by Debtor's counsel resulted in tangible benefit to the estate, this Court disagrees with that interpretation of Fifth Circuit law. (See below for specific discussion of the Parent's Objections.) This fact was recently emphasized in *In re Cyrus II Partnerships*, No. 05-39857, 2009 WL 2855725, at *5 n.5; 2009 Bankr. LEXIS 2587, *16. n.5 (Bankr. S.D. Tex. Sept. 1, 2009): "[A] service may 'benefit the estate' under *Pro-Snax* even though the service did not directly result in a quantifiable or monetary benefit."

112. In *Cyrus II*, a fee applicant sought compensation for pursuing a motion to compromise that was ultimately

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[36] *See Amended Objection to Final Fee Application*, n.15.

unsuccessful.[37] The court allowed compensation for work performed regarding the unsuccessful motion.[38] The court noted that "the failure of a motion to compromise teaches lessons that lead to an ultimate resolution."[39] The Court refused to "read *Pro-Snax* to hold that counsel can only be compensated for litigation in which the estate succeeds."[40]

113. If *Pro-Snax* required payment only upon success, then every professional compensated by an estate would be working on a contingency fee. In *Cyrus II*, the court stated that conditioning payment of a professional's fees on the success of their work would effectively force all professionals compensated by an estate to accept a contingency fee arrangement. Judge Isgur stated:

> If the Court were to read *Pro-Snax* to limit Trustee's counsel's fee awards to matters in which the Trustee was the prevailing party, then the Court would be impermissibly converting hourly lodestar fees to contingent fees. Just as courts may not convert a contingency fee approved pursuant to § 328 into an hourly fee, the Court here may not convert the pre-approved hourly fee into a contingency fee.[41]

114. Since *Pro-Snax*, courts have struggled with the question of whether to analyze material benefit from a hindsight or "at the time the services were rendered" perspective. Reorganized ASARCO argues that the material benefit test is an objective after-the-fact test whereby the Court must determine "'whether [] services

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[37] *In re Cyrus II P'ships*, 2009 WL 2855725, at *8.
[38] *In re Cyrus II P'ships*, 2009 WL 2855725, at *9.
[39] *In re Cyrus II P'ships*, 2009 WL 2855725, at *9.
[40] *In re Cyrus II P'ships*, 2009 WL 2855725, at *9 (citing *Pro-Snax*, 157 F.3d at 426).
[41] *In re Cyrus II P'ships*, 2009 WL 2855725, at *10.

resulted in an identifiable, tangible, and material benefit to the bankruptcy estate,' regardless of the reasonableness of such services at the time that they were rendered."[42]

115. Courts have applied the material benefit test in three fashions: first, some courts apply a strict hindsight test;[43] second, some courts state that they apply a pure hindsight approach but then include a prospective viewpoint in their analysis;[44] and third, some courts apply a hybrid approach that explicitly includes prospective and hindsight viewpoints.[45] The third approach is the better-reasoned approach because it harmonizes the express language of section 330(a)(3)(C) of the Bankruptcy Code, which states that the necessity and benefit of services should be evaluated "at the time at which the service was rendered," with the Fifth Circuit's decision in *Pro-Snax*.

116. Under any standard, the services that Baker Botts provided to the Debtors during the Application Period were necessary and beneficial to the bankruptcy estates. The benefits Baker Botts' representation produced for the estates are significant and numerous. As this Court has noted before, the ASARCO bankruptcy "is probably the most successful Chapter 11 of any magni-

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[42] *See Amended Objection to Final Fee Application*, ¶ 18 (quoting *Quisenberry v. Am. State Bank (In re Quisenberry)*, 295 B.R. 855, 865 (Bankr. N.D. Tex. 2003)).

[43] *See In re Weaver*, 336 B.R. 115, 119 (Bankr. W.D. Tex. 2005), *In re Quisenberry*, 295 B.R. at 865.

[44] *See PricewaterHouseCoopers, LLP v. Litzler (In re Harbor Fin. Group, Inc.)*, 99-37255, 2001 WL 1041785, at *3–4 (N.D. Tex. Sept. 5, 2001); *In re JNS Aviation, LLC*, 04-21055, 2009 WL 80202, at *8 (Bankr. N.D. Tex. Jan. 9, 2009).

[45] *See In re Spillman Dev. Group, Ltd.*, 376 B.R. 543, 550–54 (Bankr. W.D. Tex. 2007); *In re Energy Partners, Ltd.*, 409 B.R. 211, 228–30 (Bankr. S.D. Tex 2009).

tude in the history of the Code."[46] The outcome of these cases for creditors and for ASARCO itself far surpassed expectations. Creditors have been paid in full and ASARCO has been remade into a functioning business. Below is a non-exhaustive list of examples where Baker Botts provided a material and tangible benefit to the bankruptcy estates:

- obtaining the SCC Judgment, which motivated the Parent to file the full-payment plan;
- developing the innovative auction of the SCC Judgment;
- identifying Sterlite as a plan sponsor;
- maintaining competition in these cases by negotiating the New Sterlite PSA;
- vigilantly representing the Debtors during the confirmation hearing whereby both plan sponsors' plans were amended multiple times to improve recovery to creditors;
- assisting the Parent with closing the multi-billion-dollar transaction contemplated under the Parent's plan;
- devising and implementing an unprecedented procedure for estimation of over $6 billion of environmental claims asserted by federal and state agencies, Native American tribes, and individual parties;
- eliminating almost $5 billion of the Debtors' environmental liabilities;
- pursuing estimation of ASARCO's asbestos liability, creatively collecting claims data, and vigorous-

[46] Hr'g Tr. 41:5–6, November 23, 2009.

ly negotiating with the parties representing asbestos claims and future demands;

- reducing the Debtors' toxic-tort liability by approximately 94% from $1.383 billion to $34.97 million;
- resolving ASARCO's reclamation obligation under the Mission Mine Leases;
- participating in resolution of the labor strike;
- obtaining an injunction prohibiting the dismantling of the profitable South Mill, avoiding the sale of the mill, and obtaining the return of the mill, which ultimately earned the estates millions of dollars; and
- realizing tax benefits for the estates.

f. **Performance of Services Within a Reasonable Amount of Time**

117. The Court may determine what is the reasonable amount of time a professional should have to spend on a given project.[47] The Court may draw inferences of the reasonable amount of time necessary to perform legal services based on the record of the proceeding.[48]

118. As Mr. Kinzie testified, there are bankruptcy cases in which the only significant issue is the company's asbestos liability that lasted longer than these cases. When one combines the opposition of the Parent with the asbestos, environmental, toxic tort, labor, corporate governance, tax, litigation, and other issues that had to be addressed, these cases were resolved in a remarkably short period of time. Further, Baker Botts positioned

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[47] *In re Palladino*, 267 B.R. 825, 831 (Bankr. N.D. Ill. 2001).

[48] *All Trac Transp., Inc. v. Transp. Alliance Bank (In re All Trac Transp., Inc.)*, 310 B.R. 570, 573 (Bankr. N.D. Tex. 2004).

these Debtors for a robust, competitive confirmation hearing as early as November 2008, but citing the global financial crisis and the collapse of credit and commodity markets in September 2008, Sterlite refused to proceed with its purchase obligations under its original purchase and sale agreement and the Parent withdrew its 2008 plan shortly thereafter. The Court also notes that Reorganized ASARCO did not argue, or present any evidence to suggest, that any particular task that Baker Botts performed was not performed in a timely or reasonable manner.

119. The Court holds that based on the services that the Debtors required of Baker Botts, the complexity of these chapter 11 cases, and the time required to achieve full recovery to creditors, the services that Baker Botts performed for the Debtors were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problems, issues, and tasks addressed in these cases.

g. **Customary Compensation Charged by Comparably Skilled Practitioners**

120. Section 330 and its legislative history express a congressional intent "that compensation in bankruptcy matters be commensurate with the fees awarded for comparable services in non-bankruptcy cases."[49] As Judge Perris stated in *Columbia Aircraft Manufacturing Corporation*, No. 07-33850, 2008 WL 1337855, at *2 (Bankr. D. Or. Apr. 10, 2008), "[t]he idea behind the factors set out in § 330(a)(3) is that professionals should not be paid an arbitrarily low rate in bankruptcy cases (in

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[49] *In re UNR Indus., Inc.*, 986 F.2d 207, 209 (7th Cir. 1993) (citing H.R. Rep. No. 595, 329–30, reprinted in 1978 U.S.C.C.A.N. 5963, 6286).

order to preserve the estate), but instead should be paid comparably to rates they would receive outside bankruptcy, so professionals will be willing to serve in bankruptcy cases." In discussing section 330(a)(3)(E), another court stated that it "strives to balance the fiduciary obligation of a debtor to spend its limited assets in a judicious fashion so as to maximize the ultimate distribution to its creditors against the importance of compensating the professionals who advise the chapter 11 debtor fairly, so as to encourage competent and experienced professionals to continue to participate in chapter 11 cases."[50]

121. During the Application Period, Baker Botts charged the Debtors at its standard rates. As the Court previously noted, the majority of Baker Botts' timekeepers billing to these cases were non-bankruptcy lawyers. Exhibit C to the Fee Application reflects that Baker Botts does not charge more for a particular service, including bankruptcy work.[51] Moreover, there is no evidence in the record that comparably skilled practitioners would have charged less in non-bankruptcy cases than the Baker Botts professionals and paraprofessionals charged in these cases. To the contrary, the evidence shows that Baker Botts' standard rates are below market. The Court holds that the total compensation that Baker Botts requests, inclusive of the upward adjustment to the fees discussed below, is consistent with the customary billing practice of Baker Botts to charge a premium for outstanding results, and is consistent with the customary compensation charged by comparably skilled practitioners in non-bankruptcy cases.

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[50] *See In re Fibermark, Inc.*, 349 B.R. 385, 395–96 (Bankr. D. Vt. 2006).

[51] *See Final Fee Application*, Baker Botts Exhibit 17, Exhibit C.

B. Reorganized ASARCO's Objections to the Fees Charged by Baker Botts to the Estates During the Application Period

122. As described above, Reorganized ASARCO objects to Baker Botts' requested compensation and argues that the requested fees charged by Baker Botts to the estates during the Application Period should be reduced for various reasons. The Court has considered Reorganized ASARCO's objections and finds them to be without merit.

1. The Court's Discretion in Evaluating Fees and Objections Thereto

123. The Court has broad discretion in evaluating the Fee Application and the objections thereto.[52] Appellate courts defer to the sound discretion of the bankruptcy court because that court "is more familiar with the actual services performed and 'has a far better means of knowing what is just and reasonable than an appellate court can have.'"[53]

124. The Court can and should utilize its own knowledge of these cases in assessing the Fee Application.[54]

The Court is itself an expert on the fees in question and, as such, is not bound by the testimony of expert wit-

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[52] *Lawler v. Teofan (In re Lawler)*, 807 F.2d 1207, 1211 (5th Cir. 1987) ("[T]he bankruptcy court has broad discretion in determining compensation for services performed in a bankruptcy proceeding.").

[53] *In re Lawler*, 807 F.2d 1207, 1211.

[54] *See Nat'l Benevolent Ass'n of Christian Church v. Weil, Gotshal, & Manges, L.L.P.*, No. 04-50948-RBK, 2006 WL 2516522, at *3 (W.D. Tex. Aug. 2, 2006) ("[T]he Bankruptcy Court is intimately aware of the fee application in question, and it is prudent for the bankruptcy judge to use his background knowledge of the case to reach a decision on this issue.").

nesses, even if unrebutted.[55] The Court has used its first-hand knowledge of these cases in evaluating the Fee Application and Reorganized ASARCO's objections to the Fee Application.

125. Many of Reorganized ASARCO's objections to Baker Botts' fees are grounded in the argument that compensation should be denied when counsel fails to strictly adhere to the Guidelines.[56] While the Guidelines are useful tools for counsel, they are not binding on the Court. The Guidelines are in place to aid fee applicants in providing the Court with sufficient information to determine whether requested fees are reasonable. So long as the Court has such information, the purpose of the Guidelines has been fulfilled.

2. Information Needed to Determine if Fees are Reasonable

126. Baker Botts has provided the Court with ample and detailed information regarding the services performed by the Firm through the Fee Application, proffers, hearing testimony, and other evidence. The Court concludes that this information is sufficiently detailed to allow the Court to assess the reasonableness of Baker Botts' fees.

127. Billing records need only provide the Court with sufficient information to allow the Court to evaluate the reasonableness of the requested fees.[57] Fee applications

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[55] *See In re McClanahan*, 137 B.R. 73, 74 (Bankr. M.D. Fla. 1992) (expert testimony regarding attorneys fees not binding on the court even if such testimony is unrebutted).

[56] ASARCO Exhibit 1007A, Meckler Report, ¶ 47; *Amended Objection to Final Fee Application*, ¶ 19.

[57] *In re Pan Am. Gen. Hosp. LLC*, 385 B.R. 855, 876 (Bankr. W.D. Tex. 2008) ("We must remember the purpose of the fee detail—to allow the court to evaluate the reasonableness of the requested fee.

that do not reach "an ideal level of completeness" may still support an award for compensation so long as the Court has sufficient information to assess the reasonableness of the fees.[58]

128. Applicants are not required to "'detail the exact number of minutes spent nor the precise activity to which these hours are devoted.'"[59] It is sufficient if the billing entries "show the amount of time devoted to the case by each of the involved persons" and make clear that "the work was not duplicative or otherwise prohibited by the Bankruptcy [Code]."[60]

a. **Reorganized ASARCO's Objections Regarding the Specificity of Billing Entries**

129. Reorganized ASARCO asserts that $9,373,251 in fees for work performed by Baker Botts should be disallowed in full because the work performed allegedly was inadequately described in Baker Botts' billing statements. The Court has considered this objection along with the testimony of Reorganized ASARCO's expert, Mr. Meckler, on this subject. The Court finds this objection without merit and will not reduce Baker Botts' requested fees on these grounds.

130. Baker Botts' billing descriptions, when considered in conjunction with the record and the Court's knowledge of these cases, are sufficiently detailed to pro-

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So long as the detail provided is sufficient for the court to make that determination, that is enough.").

[58] *In re Lawler*, 807 F.2d 1207, 1211–12 (5th Cir. 1987) ("While the time sheets submitted by [the applicants] did not reach an ideal level of completeness, it cannot be said that they lack the necessary information.").

[59] *In re Lawler*, 807 F.2d 1207, 1211–12 (quoting *Riddell v. Nat. Democratic Party*, 545 F. Supp. 252, 257 (S.D. Miss. 1982)).

[60] *In re Lawler*, 807 F.2d at 1211–12.

vide the Court with an opportunity to assess the reasonableness of the requested fees.

131. Furthermore, Reorganized ASARCO's own experts disagree as to what constitutes a vague or inadequate billing description. Billing entries identified by Mr. Meckler as vague were identified as not vague by Judge Monroe, who has considerably more experience in evaluating fee requests in bankruptcy.

132. Billing descriptions are sufficient so long as the Court possesses enough information to determine if the requested fees are reasonable.[61] Courts have recognized that a billing entry that could be considered vague if read in isolation, may not be vague when viewed in the context of the surrounding work performed.[62] Likewise, billing entries that appear vague to an outside fee expert or fee auditor, may not be vague to the Court, which is very familiar with the case.[63] This is especially true where the outside fee expert is not a bankruptcy practitioner.[64]

133. In light of these standards, the Court finds the level of detail submitted by Baker Botts to be sufficient.

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[61] *In re Pan Am. Gen. Hosp.*, 385 B.R. 855, 876 (Bankr. W.D. Tex. 2008).

[62] *In re Worldwide Direct, Inc.*, 316 B.R. 637, 644 (Bankr. D. Del. 2004) ("Though other entries were not very explicit, when viewed in context with the other work done by the attorneys at the same time... the Court is able to determine what issues were researched.").

[63] *In re Worldwide Direct, Inc.*, 316 B.R. at 644.

[64] *In re Worldwide Direct, Inc.*, 316 B.R. at 644 ("since the Fee Auditor was not a bankruptcy practitioner and did not inquire of anyone involved in the case about the nature of the research, he could not opine as to its significance. The court is familiar with the case (and the contested issues) and, therefore, is able from the descriptions and the context to determine the appropriateness of the research done.")

The Court would reach the same conclusion with or without Baker Botts' revised time entries.

134. Even if Baker Botts' billing entries could be considered vague, denying the requested compensation would not be appropriate in light of Baker Botts' performance in these cases. Reduction of fees is not mandatory for insufficiently detailed time records.[65]

b. **Reorganized ASARCO's Objections Regarding Block-Billing**

135. Reorganized ASARCO requests that the Court reduce Baker Botts' fee because time entries for approximately $12,900,000 worth of work performed were allegedly block-billed. The Court has considered this objection and finds it without merit. The billing entries to which Reorganized ASARCO objects do not prevent the Court from assessing the reasonableness of Baker Botts' requested fees.

136. Applicants are not required to "'detail the exact number of minutes spent nor the precise activity to which these hours are devoted.'"[66] Applications that do not reach "an ideal level of completeness" may still support an award for compensation.[67]

137. While counsel should make an effort to separate their time by project, such a requirement should not be enforced as to "impose slavish and over burdensome rec-

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[65] *See In re Wire Cloth Prods. Inc.*, 130 B.R. 798, 807 (Bankr. N.D. Ill. 1991) ("The Court also agrees that certain time entries are insufficiently detailed. However, such deficiencies do not warrant a reduction in compensation due to other factors which weigh heavily in the Court's evaluation.").

[66] *In re Lawler*, 807 F.2d 1207, 1211–12 (5th Cir. 1987) (quoting *Riddell v. Nat. Democratic Party*, 545 F. Supp. 252, 257 (S.D. Miss. 1982)).

[67] *In re Lawler*, 807 F.2d 1207, 1211–12.

ord-keeping requirements which, in the final analysis, result in fee applications of such enormous length and detail that they are of little ultimate value to the Court in awarding fees."[68] Courts refuse to reduce requested compensation for clumped time when such clumping has not been a detriment to the estate.[69] Compensation may be awarded for clumped time where the Court, using its own knowledge of the case, can determine the time spent was reasonable.[70]

138. Reorganized ASARCO's own experts did not agree on a definition of clumping or which Baker Botts billing entries should be considered impermissibly clumped. When presented with billing entries identified as impermissibly clumped by Mr. Meckler, Judge Monroe did not believe that such entries were inappropriate.

139. The evidence submitted by Baker Botts and the record as a whole contain ample information allowing the Court to assess the reasonableness of requested fees. In light of this evidence and the Court's own knowledge of the case, the Court holds that compensation should not be reduced on the grounds that certain billing entries were allegedly clumped. The Court would reach the

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[68] *In re Reconversion Techs., Inc.*, 216 B.R. 46, 58 (Bankr. N.D. Okla. 1997).

[69] *In re Reconversion Techs., Inc.*, 216 B.R. 46, 58; *see also In re Lanier Spa*, 99 B.R. 490, 492 (Bankr. N.D. Ga. 1989) ("When such lumping makes it impossible for the court to allocate time to each activity or to each attorney, the court may disallow all the hours which were lumped together . . . . In the instant case, however, the lumping is not so egregious as to prevent the court from determining if the number of hours spent on specific activities were reasonable.").

[70] *See In re McGuier*, 346 B.R. 151, 168 (Bankr. W.D. Pa. 2006) ("The entries again include the practice of 'lumping'. Nevertheless, the Court was able to discern the necessity and reasonableness of the services.").

same conclusion with or without Baker Botts' revised time entries.

c. **Supplemental Information Submitted by Baker Botts**

140. After Reorganized ASARCO filed its Amended Objection to the Fee Application, Baker Botts submitted supplemental billing descriptions that provided the Court with additional information regarding the tasks performed and the specific amounts of time spent on certain tasks. While the Court finds that the Fee Application contained sufficient information without these supplemental billing descriptions, the Court notes that this additional information supports the conclusion that the requested fees are reasonable.

141. Supplementation of fee applications is permissible.[71] Courts permit supplementation of fee applications to address concerns such as alleged clumping or vagueness.[72]

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[71] *See Zolfo, Cooper & Co., v. Sunbeam-Oster Co., Inc.*, 50 F.3d 253, 262 (3rd Cir. 1995) ("When a bankruptcy court denies compensation to an applicant who has attempted to comply in good faith with specificity requirements of the bankruptcy rules, the court should allow time to supplement the application."); *In re Busy Beaver Building Ctrs., Inc.*, 19 F.3d 833, 847–48 (3rd Cir. 1994) (if a court determines that there are deficiencies in an application, the court should "allow the professional a reasonable time to supplement the application with either a more detailed description of the questionable services, or with a memorandum of points and authorities in support of the application.").

[72] *See In re Indep. Am. Real Estate, Inc.*, 146 B.R. 546, 556 (Bankr. N.D. Tex. 1992) (temporarily disallowing a portion of an applicant's fees due to clumping, but permitting the applicant to file supplemental information curing these defects); *In re Temple Retirement Cmtys., Inc.*, 97 B.R. 333, 339 (Bankr. W.D. Tex. 1989) ("Counsel should supplement their time records with written narrative that places the services rendered in context so that the court can evaluate

142. The supplemental information submitted by Baker Botts was considered by the Court and supports the Court's conclusion that the requested fees are appropriate and should not be reduced on the grounds that billing descriptions were inadequate.

3. Clerical and Administrative Efforts

143. Reorganized ASARCO asserts that approximately $3,469,155.00 in fees should be completely disallowed because the underlying work was allegedly administrative in nature.[73]

The Court has considered this argument and finds it without merit. The Court will not reduce Baker Botts' compensation on the grounds that work performed was administrative or clerical in nature.

144. "[T]he classification of services as clerical or non-clerical does not decide the question of compensability under § 330: clerical services may be compensated in the proper context."[74] "[T]he bankruptcy court should review fee applications not for whether each particular service undertaken by a paralegal is clerical or paraprofessional by nature, but for whether non-bankruptcy attorneys typically charge and collect from their clients fees for that particular service when performed by a member

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the necessity of their rendition."); *In re Garrison Liquors, Inc.*, 108 B.R. 561, 566 (Bankr. D. Md. 1989) ("The time records submitted in support of the application are deficient because they fail to disclose the nature of services performed, and in fact are indecipherable . . . . Counsel will be afforded the opportunity to correct the various problems outlined in this opinion by submitting a revised fee application within 60 days.").

[73] *Amended Objection to Final Fee Application*, ¶¶ 37–38

[74] *In re Busy Beaver*, 19 F.3d at 851.

of that profession and the rates charged and collected therefor."[75]

145. The Court concludes that Baker Botts' compensation should not be reduced on the grounds that certain tasks performed were clerical or administrative in nature because Baker Botts has shown that the Firm typically charges its clients fees for such services.[76] Other firms also typically charge their clients for such services. Furthermore, the Court concludes that many of the categories of services alleged to be administrative by Reorganized ASARCO in fact required legal training or knowledge. The Court concludes that the services objected to by Reorganized ASARCO on these grounds were actual, reasonable, necessary, and beneficial to the estates.

4. Summer Associates

146. Reorganized ASARCO asserts that approximately $493,000.00 in fees requested by Baker Botts should be completely denied because the underlying work was performed by summer associates. The Court has considered this argument and finds it without merit. The Court will not reduce Baker Botts' requested fees on the grounds that certain fees reflect work performed by summer associates.

147. "[S]ummer associates can be valuable and worthy of billing at reasonable rates."[77] Numerous bankruptcy

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[75] *In re Busy Beaver*, 19 F.3d at 849.

[76] *See* Baker Botts Exhibit 3, Proffer of J. Prince, ¶¶ 168–186.

[77] *In re Recycling Indus., Inc.*, 243 B.R. 396, 404 (Bankr. D. Colo. 2000) (allowing a firm to bill for summer associates, but reducing the rates at which they were billed).

courts have allowed compensation for work performed by summer associates.[78]

148. Summer associate time is compensable outside of bankruptcy as well. As the Supreme Court has stated, "the increasingly widespread custom of separately billing for services of paralegals and law students who serve as clerks . . must be taken into account."[79] "[E]ncouraging the use of low cost [paralegals and law clerks] rather than attorneys wherever possible . . . encourages cost-effective delivery of legal services."[80]

149. The Court rejects Mr. Meckler's "extraordinary showing" standard for paying fees for summer associate work. As long as summer associate work is necessary and beneficial to the estates and the time expended is reasonable—in order words, as long as the work satisfies the criteria established by section 330 of the Bankruptcy Code—debtor's counsel can collect fees for work performed by summer associates.

150. The Court has awarded compensation for work performed by summer associates in the past. Furthermore, the Court notes that several firms involved in these

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[78] *See, e.g., In re Child World, Inc.*, 185 B.R. 14, 19 (Bankr. S.D.N.Y. 1995) (finding that fees requested by debtor's counsel for paralegals and summer associates were reasonable within the meaning of § 330 based on testimony from the debtor despite objections from the Trustee); *In re Davidson Metals, Inc.*, 152 B.R. 917, 921–22 (Bankr. N.D. Ohio 1993) (finding that $75 per hour was a reasonable rate for summer associates but reducing an applicant's fees by 30% based on other factors); *In re Auto Parts Club, Inc.*, 224 B.R. 445, 449 (Bankr. S.D. Cal. 1998) (allowing a firm to charge "summer interns" at $80 an hour instead of the $140 an hour requested by the firm).

[79] *Missouri v. Jenkins*, 491 U.S. 274, 286 (1989) (citing *Ramos v. Lamm*, 713 F.2d 546, 558 (10th Cir. 1983)).

[80] *Missouri v. Jenkins*, 491 U.S. at 288 (citing *Cameo Convalescent Ctr., Inc. v. Senn*, 738 F.2d 836, 846 (7th Cir. 1984)).

cases billed and collected for summer associate time, including counsel for Reorganized ASARCO.

151. The Court finds fees billed by Baker Botts summer associates to be reasonable and their work beneficial to the estates. Accordingly, Baker Botts' requested compensation will not be reduced on the grounds that the Firm billed for work performed by summer associates.

5. Document Review Efforts

152. Reorganized ASARCO asserts that "all attorneys who performed document review tasks should have been billed at the lowest billing rate of any document review attorney." Reorganized ASARCO requests that Baker Botts' fees be reduced by $1,689,298 for fees associated with document review. The Court has considered this argument and finds it without merit. The Court will not reduce Baker Botts' requested compensation on these grounds.

153. The "document review" work performed by Baker Botts' attorneys consisted of screening documents for privilege, responding to discovery requests, identifying exhibits for use at deposition or at trial, preparing summaries of particular factual matters, and other trial preparation work.

154. The Court finds the fees associated with document review work are reasonable and that the work performed was necessary and beneficial to the estates. Reorganized ASARCO cites to no authority holding that debtor's counsel should charge uniform and reduced rates for document review. Furthermore, the Court notes that the billing rates charged by the Parent's counsel for document review attorneys exceeds the rates Reorganized ASARCO would have the Court impose on Baker Botts.

6. Services that Allegedly Failed to Provide a Material Benefit to the Estates

155. Reorganized ASARCO requests that the Court reduce Baker Botts' requested compensation for $9,022,885 in fees for work that, according to Reorganized ASARCO, did not provide a material benefit to the estates. The Court has considered this objection and finds it to be without merit. The Court finds that the work performed by Baker Botts was necessary and provided a material benefit to the estates.

156. Reorganized ASARCO cites to the *Pro-Snax* decision in support of its position that Baker Botts' requested compensation should be reduced. Reorganized ASARCO misconstrues the language of *Pro-Snax* to require something that it does not. Contrary to Reorganized ASARCO's interpretation, *Pro-Snax* does not require that every action taken by a debtor's counsel be successful in order for counsel to receive compensation.

157. The facts of the *Pro-Snax* case differ significantly from these cases. *Pro-Snax* was filed as an involuntary chapter 7 and converted to a chapter 11 by the debtor.[81] Creditors requested that the case be reconverted to chapter 7.[82] The court denied the motion to reconvert but appointed a chapter 11 trustee.[83] The court was presented with two separate issues: (1) whether debtor's counsel could be compensated for services after the trustee had been appointed, and (2) whether debtor's counsel could be compensated for services performed before the appointment.[84] The majority of the court's opinion addressed the first question: compensation for work done

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[81] *Pro-Snax*, 157 F.3d at 416–418.
[82] *Pro-Snax*, 157 F.3d at 416–418.
[83] *Pro-Snax*, 157 F.3d at 416–418.
[84] *Pro-Snax*, 157 F.3d at 419–20, 26.

after the appointment of the trustee, which the court concluded should not be awarded. At the end of the court's opinion, the court briefly addressed the second question of compensation before the trustee was appointed.[85] The court concluded that for work by a debtor's counsel to be compensable, the work must have provided material benefit to the estate.[86] The court denied compensation to debtor's counsel for pursuing a failed chapter 11 plan because the majority of creditors "repeatedly informed the Debtor and the bankruptcy court that they believed the case should be administered under chapter 7."[87] The court denied compensation to the applicant on the basis that the services were not reasonable at the time performed and because such services were not beneficial when judged in hindsight.[88]

158. Unlike in *Pro-Snax*—where the creditors urged liquidation, and the fee applicant, as noted by the Fifth Circuit, should have known from the outset that prosecution of the debtor's chapter 11 plan would fail—in these cases creditors voted overwhelmingly in favor of confirmation of the Debtors' plan, which in turn provided the competitive pressure that resulted in the Parent's full-payment plan..[89]

7. Benefit Conferred by Specific Categories of Services

159. Reorganized ASARCO seeks to disallow fees for six categories of services: (a) seeking a cash bond for the

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[85] *Pro-Snax*, 157 F.3d at 425–26.

[86] *Pro-Snax*, 157 F.3d at 425–26.

[87] *Pro-Snax*, 157 F.3d at 425–26.

[88] *Pro-Snax*, 157 F.3d at 425–26 ("[W]e find that [the applicant] should have known from the outset that the Debtor's prosecution of a Chapter 11 plan would fail.").

[89] *Amended Report and Recommendation* at 7, 111.

SCC Judgment, (b) researching and drafting a directors and officers bonus motion, (c) researching and drafting a contingency fee memorandum, (d) researching and drafting a conflict of interest memorandum, (e) plan confirmation efforts from May 2008 until the 9019 Hearing for the New Sterlite PSA, and (f) supporting a revised plan after this Court's confirmation recommendation.[90] These services provided benefits to the estates as follows.

a. **Cash Bond for the SCC Judgment**

160. By putting pressure on the Parent to provide some manner of security on appeal and ultimately obtaining additional security on appeal, Baker Botts provided a tangible benefit to the estates.

161. In its Amended Objection, Reorganized ASARCO asks the Court to disallow $186,935 in fees requested in the Fee Application for efforts to obtain a cash bond for the SCC Judgment because these efforts purportedly provided no material benefit to the estates. The Court disagrees with Reorganized ASARCO and finds that Baker Botts' efforts to secure the SCC Judgment provided tangible and material benefit to the estates.

162. The District Court entered a final judgment in the SCC Litigation on April 15, 2009, requiring AMC to return to ASARCO stock and dividends and prejudgment interest (net of consideration paid) worth over $6 billion. That same day, the District Court entered an agreed order restricting the transfer and voting of shares of SCC by AMC and execution on or enforcement of the SCC Judgment by ASARCO. Under the agreed order, ASARCO could not take any action to execute on or enforce the SCC Judgment from the date of the agreed order through June 5, 2009.

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[90] *Amended Objection to Final Fee Application*, ¶ 5.

163. On April 24, 2009, AMC filed a notice of appeal from the SCC Judgment and all adverse orders, rulings, decrees, opinions, and judgments leading up to and included within that judgment. Five days later, on April 29, 2009, AMC filed a motion to alter or amend the SCC Judgment or for a new trial and a motion for stay of execution of the SCC Judgment pending appeal of that judgment.

164. ASARCO's independent directors instructed Baker Botts to do everything necessary to protect the SCC Judgment, which they considered to be ASARCO's most valuable asset.

165. In response to the motion to stay, ASARCO argued that the District Court should allow it to execute on the SCC Judgment or the District Court should stay execution only upon the posting of a supersedeas bond, as required by Federal Rule of Civil Procedure 62(d).

166. In seeking a cash bond for the SCC Judgment at the direction of the Independent Committee, Baker Botts helped ASARCO fulfill its fiduciary duties to increase and protect the assets of the estates.

167. On June 2, 2009, the District Court entered a memorandum opinion and order partially granting and partially denying AMC's motion for stay of execution of the SCC Judgment. The District Court did not require AMC to post a supersedeas bond to secure the monetary portion of the SCC Judgment. The District Court nevertheless adopted almost all of the minimum requirements sought by Baker Botts to secure both the non-monetary and monetary portion of that judgment.

168. The Court finds that Baker Botts' efforts to maximize the security provided by AMC pending appeal of

the SCC Judgment provided tangible and material benefit to the estates.

b. **Directors and Officers Bonus Motion**

169. Researching and drafting the directors and officers bonus motion provided tangible benefit to the estates by securing appropriate compensation for ASARCO's management.

170. In its Amended Objection, Reorganized ASARCO asks the Court to disallow $10,207 in fees requested in the Fee Application for efforts researching and drafting the directors and officers bonus motion because these efforts purportedly provided no material benefit to the estates. This objection concerns the *Motion for Approval of Bonuses to Edward R. Caine and H. Malcolm Lovett, Jr. as Members of the Board of Directors of ASARCO LLC and Joseph F Lapinsky* filed on December 4, 2009. The Court disagrees with Reorganized ASARCO and finds that Baker Botts' efforts with respect to the directors and officers bonus motion provided a tangible and material benefit to the estates.

171. On December 3, 2009, the Board, in a two-to-one vote, passed a resolution approving a bonus of no more than $4 million to be divided among board members electing to participate. The Board also voted by a two-to-one margin to pay ASARCO's President, Joseph Lapinsky, a bonus of $2.5 million. The Board directed Baker Botts to file a motion approving payment of the bonuses. No creditor objected to the motion.

172. On December 9, 2009, the Parent assumed control of Reorganized ASARCO and a new board of directors was appointed. On December 22, 2009, the new board voted by unanimous written consent to rescind the prior board's action in approving the bonuses and author-

ized withdrawal of the motion. On March 24, 2010, this Court denied the motion.

173. Mr. Caine, Mr. Lovett, and Mr. Lapinsky each deserved consideration for a special bonus. In its order denying the motion, this Court noted that the service of Messrs. Lovett, Caine, and Lapinsky "was not only highly beneficial to the debtor, but also professional in every aspect."

174. The Court finds that Baker Botts' efforts in researching and drafting the directors and officers bonus motion provided tangible and material benefit to the estates by helping the Debtors and the Court ensure that appropriate compensation was paid to members of the management team who successfully guided the Company through the chapter 11 process. The Board directed Baker Botts to file the motion, and no creditor constituency opposed it. Baker Botts' efforts were reasonable, necessary, and compensable. Actions taken by Reorganized ASARCO to rescind the Board's prior approval of the motion after the Parent assumed control of the Company can be attributed to the Parent and should not be permitted to deny Baker Botts reasonable compensation for its services.

c. **Contingency Fee Memorandum**

175. Researching and drafting the contingency fee memorandum provided tangible benefit to the estates by allowing the parties to assess all compensation arrangements and their prospective benefits for ASARCO.

176. In its Amended Objection, Reorganized ASARCO asks the Court to disallow $5,780 in fees requested in the Fee Application for efforts researching and drafting a memorandum on the question of whether Baker Botts should bill its time for the SCC Litigation on

a contingency-fee basis because these efforts purportedly provided no material benefit to the estates. The Court disagrees with Reorganized ASARCO and finds that Baker Botts' efforts with respect to the contingency-fee memorandum provided a tangible and material benefit to the estates.

177. In November 2006, Mr. Terrell raised the issue with Mr. Kinzie of whether Baker Botts could represent ASARCO in what would later become the SCC Litigation on a contingency-fee basis. Baker Botts considered whether a contingent fee was appropriate in order to perhaps reduce the estates' legal costs. Baker Botts researched whether and under what circumstances bankruptcy law would allow a contingency-fee arrangement. Baker Botts ultimately decided, and ASARCO and the ASARCO Committee's counsel concurred, that the litigation should be pursued on an hourly basis.

178. Baker Botts' efforts in connection with the contingency-fee memorandum provided tangible and material benefit to the estates by allowing Company management and creditor constituencies to assess various compensation arrangements and their respective benefits to ASARCO. These efforts were reasonable, necessary, and compensable. In hindsight this may have saved the Debtors' parent several billion dollars.

d. **Conflict of Interest Memorandum**

179. In its Amended Objection, Reorganized ASARCO asks the Court to disallow $79,863 in fees requested in the Fee Application for efforts researching and drafting a so-called "conflict of interest" memorandum because these efforts purportedly provided no material benefit to the estates. The Court disagrees with Reorganized ASARCO and finds that Baker Botts' ef-

forts in this regard provided a tangible and material benefit to the estates.

180. In late 2007 and early 2008, events in the SCC Litigation justifiably led Mr. Terrell to believe that Grupo Mexico and AMC intended to try to disqualify Baker Botts—or even bring suit against Baker Botts on the basis of a purported "conflict situation"—as a litigation tactic in an attempt to derail the scheduled May 2008 trial. Among other things, at a hearing held on January 28, 2008, AMC's counsel suggested that Baker Botts was in a "conflict situation."

181. Mr. Terrell directed certain Baker Botts lawyers to perform legal research into disqualification issues, to investigate Baker Botts' prepetition representation of ASARCO, to determine whether any investigation into the substance of the SCC transaction had been conducted before May 2006 (when David Genender of Baker Botts began his investigation of that transaction at the direction of the Independent Committee), and to draft pleadings necessary to respond immediately in the event that Grupo Mexico or AMC were to move to disqualify or sue Baker Botts in an attempt to delay the trial.

182. Although no disqualification motion or suit was ever filed, and the trial proceeded on ASARCO's preferred expedited schedule, the Court finds that Baker Botts' efforts researching and drafting the so-called "conflict of interest" memorandum were reasonable and necessary. As the Court has noted repeatedly, the SCC Litigation aimed to obtain the return of an enormously valuable asset. The sooner AMC faced a judgment requiring the return of the fraudulently transferred stock, the sooner ASARCO would be in a position to confirm a full-payment plan of reorganization and exit bankruptcy. Baker Botts' efforts to keep the SCC Litigation trial

date, including its analysis of and preparation to defend a motion to disqualify the Firm, provided tangible benefit to the estates and are fully compensable.

e. **Initial Sterlite Plan Confirmation Efforts**

183. In its Amended Objection, Reorganized ASARCO asks the Court to disallow $8,400,000 in fees requested in the Fee Application for "Plan Confirmation Efforts from May 2008 Agreement with Sterlite until 9019 Hearing for New Sterlite Agreement" because these efforts purportedly provided no material benefit to the estates. The Court disagrees with Reorganized ASARCO and finds that Baker Botts' efforts in this regard provided a tangible and material benefit to the estates.

184. On February 4, 2008, the Debtors filed a motion seeking entry of an order approving bid procedures in connection with selecting a chapter 11 plan sponsor and exit transaction under a chapter 11 plan. On March 25, 2008, this Court approved the bid procedures on a preliminary basis, reserving the right to rule on the appropriateness of the proposed breakup fee and to give final approval to the process and other bid protections at a final hearing. The Parent and three other bidders (including Sterlite) submitted qualified bids pursuant to the court-approved bid procedures. After a two-day plan sponsor selection meeting held on May 22 and 23, 2008, at Baker Botts' offices in Dallas, the Board, by a vote of two in favor and one against, named Sterlite the "stalking horse" or "lead bidder" and authorized the Company and its advisors to negotiate (but not execute) final transaction documents with Sterlite. With board approval, ASARCO and Sterlite entered the Original Sterlite PSA on May 30, 2008. On July 1, 2008, this Court entered a final order approving (1) bid procedures for selecting a

chapter 11 plan sponsor and exit transaction and (2) bid protections for Sterlite in connection therewith. The bid protections included a break-up fee to be paid to Sterlite in the event that a higher and better bid was made for ASARCO's assets at or before confirmation.

185. On July 31, 2008, the Debtors filed a plan of reorganization proposing to sell substantially all of ASARCO's operating assets to Sterlite pursuant to the Original Sterlite PSA. The Parent sought and obtained a modification of exclusivity and filed its own competing plan on August 26, 2008. This Court approved the disclosure statements for the plans proposed at that time by the Debtors and the Parent and approved procedures for solicitation and voting on both plans. The DOJ supported the Debtors' efforts to enter the Original Sterlite PSA. By contrast, the Parent's plan received no significant creditor support.

186. Sterlite announced its intention not to perform the Original Sterlite PSA on October 14, 2008. Shortly thereafter, the Parent withdrew its plan.

187. After Sterlite's breach, ASARCO and its legal and financial advisors made a careful study and analysis of alternatives reasonably available to ASARCO and counseled and recommended that ASARCO resume discussions with Sterlite. The Debtors chose this course to maintain a competitive process and thereby maximize the value of the estates. Ultimately, the Debtors entered into the New Sterlite PSA with Sterlite and asked this Court to approve the New Sterlite PSA and revised bid protection and release provisions. This Court did so, overruling the objections of the Parent and other parties in interest after a contentious hearing on April 13-14, 2009. The Debtors submitted a new plan of reorganization based on the New Sterlite PSA with Sterlite on May 11, 2009. The

Parent submitted an amended plan on May 15, 2009. With that, the competition for ASARCO resumed.

188. In its report and recommendation, this Court found that "[t]he continuation of the Plan Selection Process resulting in the New Plan Sponsor PSA resulted in tangible benefit to the estate by promoting plan competition that resulted in the filing and prosecution of the Parent's Plan." Further, this Court found that "in connection with the New Plan Sponsor PSA, ASARCO and its Board complied with fiduciary duties and 'acted in the best interest of the Debtors, their estates and all creditors and stakeholders.'" This work was reasonable, necessary, and beneficial to the estates.

189. Engaging Sterlite throughout the bankruptcy created competition which contributed to the ultimate success of the bankruptcy. The Court finds that this work provided tangible and material benefit to the estates.

f. **Post-Recommendation Amended Sterlite Plan**

190. Supporting a revised plan after this Court's confirmation recommendation provided tangible benefit to the estates by ensuring Sterlite's continued presence in these cases, which, in turn, incentivized the Parent to close on its plan and pay creditors.

191. In its Amended Objection, Reorganized ASARCO asks the Court to disallow $340,000 in fees requested in the Fee Application for efforts supporting a Sterlite-backed plan of reorganization after the Court issued its Confirmation Report and Recommendation because these efforts purportedly provided no material benefit to the estates. The Court disagrees with Reorganized ASARCO and finds that Baker Botts' efforts in

this regard provided a tangible and material benefit to the estates.

192. This Court entered its report and recommendation in favor of the Parent's plan on August 31, 2009. The Debtors then "weighed their options, but the correct course was not obvious." Sterlite offered to improve its offer under the New Sterlite PSA, thereby improving the Debtors' plan. Because Sterlite's presence in these cases had always incentivized the Parent, Barclays recommended that the Debtors keep Sterlite as an available alternative. Sterlite agreed to waive its right to terminate the New Sterlite PSA (Sterlite had a termination right if this Court did not recommend the Debtors' plan for confirmation), and even to allow the Debtors to prepare for a closing with the Parent, but only if the Debtors objected to the report and recommendation.

193. Baker Botts, at the direction of the Board, worked to keep the Sterlite option on the table to preserve a viable back-up option in case the Parent's plan could not be consummated or if the Parent decided to withdraw its plan. While the plan documents, escrow agreements, financing arrangements, and deposit terms appeared sound, a deal closing is never certain until the deal actually closes, and one never knows what hidden loopholes or clever litigation tactics an opponent might have at the ready. Furthermore, the Parent was financing its plan and a downturn in the price of copper could have imperiled that financing and impaired the Parent's ability to close. Baker Botts prepared a memorandum to the Board summarizing certain legal considerations in connection with keeping the Sterlite option available to ASARCO as either a primary or back-up plan while, at the same time, protecting ASARCO from unintended consequences.

194. The Debtors filed the Sixth Amended Plan of Reorganization on September 10, 2009. The next day, this Court issued an order asking the Debtors to show cause why this Court should consider the newly amended plan. A hearing was held on September 15, 2010. At the hearing, the United States, ASARCO's largest creditor, encouraged this Court to consider the Sixth Amended Plan. This Court recommended that the District Court not consider the Sixth Amended Plan but also recommended confirmation of the Parent's plan as superior to the Sixth Amended Plan.

195. The District Court heard arguments in support of the Debtors' plan and the Parent's plan on October 19, 2009, and entered its confirmation order in favor of the Parent's plan on November 13, 2009. The District Court's confirmation order addressed the objections raised by the Debtors.

196. Mr. Lovett testified that he believes that filing the Sixth Amended Plan provided a benefit to the estates by ensuring the continued presence of an alternative full-payment option and by putting pressure on the Parent to close. The Court agrees. The Court finds that Baker Botts' work in support of the post-recommendation Sterlite plan was reasonable, necessary, and benefitted the estates by providing yet another incentive to close and an option in case the Parent could not or would not close.

C. Expenses

197. Throughout these cases, it was necessary for Baker Botts to incur and pay in advance substantial out-of-pocket expenses in connection with its representation of the Debtors. Baker Botts submitted regular invoices for expenses and provided this Court with an "Expense Summary" as an exhibit to the Fee Application that summarized all expenses Baker Botts charged to the

Debtors during the Application Period. Neither the Parent nor any other creditor constituent objected to expenses in any of Baker Botts' thirteen interim fee applications. In its Fee Application and responses to Reorganized ASARCO's Interrogatories, Baker Botts identified several categories of expenses that the Firm has agreed voluntarily to deduct from the requested expenses.

198. Reorganized ASARCO originally objected to $1,024,724.65 in expenses requested by Baker Botts. Reorganized ASARCO later withdrew its objections to expenses.

199. The expense reimbursements requested by Baker Botts are for actual and necessary expenses. Baker Botts charges all of its clients for the types of expenses charged to the Debtors.

200. Section 330 of the Bankruptcy Code "authorizes compensation for services and reimbursement of expenses of officers of the estate."[91] Section 330 provides for compensation of "actual, necessary expenses."[92]

201. The Court has reviewed Baker Botts' requested reimbursements for expenses and concludes that the requested expenses were actual and necessary.[93]

D. Reorganized ASARCO's Other Objections

202. Reorganized ASARCO makes several other miscellaneous objections. The Court has considered each and finds them to be without merit.

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[91] House Report No. 95-595, 95th Cong., 1st Sess. 329 (1977); *see also In re Kula*, 213 B.R. 729, 736 (B.A.P. 8th Cir. 1997) ("Section 330 applies to all bankruptcy cases, including Chapter 11 cases.").

[92] 11 U.S.C. § 330 (a)(1)(B).

[93] *See supra* Section II(F)(6).

203. Reorganized ASARCO asserts that the Court should apply a percentage reduction because Baker Botts did not create enough matter codes and because Baker Botts timekeepers did not consistently apply their time to matter codes that were created.[94] The Court has considered this objection and finds it without merit. Baker Botts segregation of time spent on various projects was sufficient to allow the Court to assess the reasonableness of the requested fees.

204. Reorganized ASARCO asserts that Baker Botts unnecessarily duplicated work performed by Baker Botts attorneys and co-counsel.[96] Reorganized ASARCO has not directed the Court to any evidence of such duplication and the Court finds that the work performed by Baker Botts was necessary and non-duplicative. Reorganized ASARCO's expert, Mr. Meckler, stated that he did not form an opinion as to whether duplication of work took place.[96] The Court will not reduce Baker Botts' fees pursuant to Reorganized ASARCO's unsubstantiated argument that duplicative work took place.

205. Reorganized ASARCO asserts that Baker Botts overstaffed these cases.[97] Reorganized ASARCO has not presented to the Court any evidence of overstaffing and the Court finds that Baker Botts' staffing of these cases was not unreasonable or unanticipated given the intensity and duration of these cases. Mr. Meckler testified that he did not reach a decision as to whether staffing was reasonable or unreasonable.[98] The Court will not reduce Baker Botts' fees pursuant to Reor-

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[94] *Amended Objection to Final Fee Application*, ¶ 7.
[96] *Amended Objection to Final Fee Application*, ¶ 23.
[96] Hr'g Tr. 64:10–21, 65:7–12, June 2, 2010 (B. Meckler).
[97] *Amended Objection to Final Fee Application*, ¶¶ 25–29.
[98] Hr'g Tr. 59:3–7, June 2, 2010 (B. Meckler).

ganized ASARCO's argument that Baker Botts overstaffed these cases.

206. Reorganized ASARCO further argues that the turnover rate of Baker Botts' attorneys working on these cases was too high.[99] The Court has not been directed to any evidence showing that Baker Botts' turnover rate was inappropriate or somehow harmful to the estates The Court finds that Baker Botts' turnover rate was appropriate. Mr. Meckler testified that he was not critical of attorney turnover.[100] The Court will not reduce Baker Botts' requested fees on these grounds.

207. Finally, Reorganized ASARCO argues that Baker Botts should have staffed the cases with lower-rate attorneys.[101] Reorganized ASARCO has submitted no evidence substantiating this claim and the Court concludes that Baker Botts' staffing of the cases was appropriate in this regard. In fact, Mr. Meckler testified that he did not find the partner-to-associate work ratio to be inappropriate.[102] The Court will not reduce Baker Botts' requested fees on these grounds.

E. Enhancement

208. In the previous Section, the Court concluded that the number of hours for which Baker Botts has sought compensation in the Fee Application are reasonable. The Court also concluded that the rates charged by Baker Botts as interim compensation under section 331 are not unreasonably high and are compensable.

209. Normally, the appropriate fee is calculated by use of the lodestar, multiplying the number of hours by

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[99] *Amended Objection to Final Fee Application*, ¶ 30.

[100] Hr'g Tr. 63:5–17, June 2, 2010 (B. Meckler).

[101] *Amended Objection to Final Fee Application*, ¶ 31.

[102] Hr'g Tr. 63:18–20, June 2, 2010 (B. Meckler).

the hourly rate. Here, however, Baker Botts seeks an enhancement of their fees either by way of an increase in the hourly rate or by award of an additional amount.

210. Reorganized ASARCO counters that the recent Supreme Court case of *Perdue v. Kenny A.*, 130 S.Ct. 1662 (2010) is controlling and bars Baker Botts' ability to receive a fee enhancement.

211. Prior to *Perdue*, the Fifth Circuit ruled that a Bankruptcy judge has discretion to award an enhancement of attorneys fees where counsel succeeded in accomplishing a substantial recovery for their clients—money which might well have been totally lost but for their efforts. *Wolf v. Frank*, 555 F.2d 1213, 1218 (5th Cir. 1977)(allowing enhancement of 33%); *Rose Pass Mines, Inc., v. Howard*, 615 F.2d 1088, 1092 (5th Cir. 1980)(allowing enhancement of 16%).

212. In *CRG Partners v. United States Trustee*, 2011 U.S. Dist. LEXIS 14243 *14 (N.D. Tex. 2011) the District Court expressly rejected the argument made by Reorganized ASARCO and held that "the Supreme Court did not intend for *Perdue* to apply outside the context of federal fee-shifting statutes." The District Court explained that "*Perdue* established a framework different from the standard that has been used in Texas bankruptcy cases in determining whether to award a fee enhancement." *Id.* at *11. The District Court noted that the *Perdue* opinion itself "expressly limits the scope of the issue to 'federal fee-shifting statutes.'" *Id.* at *13. Additionally, the District Court found that the policies underlying the federal fee- shifting statutes and the Bankruptcy Code differ substantially and materially, quoting with approval from a New Mexico bankruptcy court that "[o]ther than the commonality of the lodestar as the subject of *Perdue* and of this case, which commonality arises from the fact

that the lodestar methodology for calculating fees became commonplace after the practice of hourly billing had become widespread, the holding in *Perdue* is irrelevant for [the court's] inquiry." *Id.* at *13 (quoting *In re Heise*, 436 B.R. 143, 149 (Bankr. D.N.M. 2010)).

213. In refusing to ignore decades of established bankruptcy jurisprudence based on a decision in a civil-rights case that does not even contain the word "bankruptcy," the District Court correctly observed that "[i]t is one thing for a court to seek guidance from a case decided in a different context; it is another thing entirely for a court to allow such a case to displace its previously established precedent." *Id.* at *15. "Furthermore, the mere fact that the Fifth Circuit relies on Johnson in evaluating fees in bankruptcy cases does not compel the conclusion that *Perdue* applies as well." *Id.* at *17. Indeed, courts are not rigidly bound to apply Supreme Court fee-shifting precedent in non-fee-shifting contexts. *Klein v. O'Neal, Inc.* 705 F.Supp. 2d 632 (N.D.Tex. 2010)(*Perdue's* application is strictly limited to federal fee-shifting cases and is inapplicable outside that context.); *Sheperd v. Dallas County*, No. 3:05-CV-1442-D, 2010 WL 2573346, at *3 n.2 (N.D. Tex. June 24, 2010); *In re Vioxx Products Liability, Inc.*, No. 1567, 2010 WL 5576193, at *17 n.25(E.D. La. Oct 19, 2010)(*Perdue* has little bearing on the use of the lodestar as a cross-check of a common benefit fee awarded as a percentage of a common fund). This was true before *Perdue* and it continues to be true after *Perdue*. The body of case law has developed organically over the course of more than thirty years, during which time the Bankruptcy Code has been amended and jurisprudence unique to bankruptcy cases has evolved independent of the jurisprudence governing civil rights cases.

214. While *Perdue* is not binding, it does establish principles which must be followed in any request for an enhancement. First, whether it is a request to increase the hourly rate upward or a request for a lump sum bonus, enhancement is only appropriate in the rare and exceptional case. *Perdue, supra.* at 1673. Ordinarily, the amount billed by an attorney is the maximum reasonable fee. Second, the burden of proof for an enhancement is on the requesting attorney. The applicant must prove that the enhancement is warranted. *Perdue, supra.* at 1673. Third, the success in the case must be the result of the applicant's efforts. The outcome cannot be the result of inferior performance by opposing counsel, unanticipated concessions, or luck. *Perdue, supra* at 1674. Finally, the awarding court must be able to make findings which adequately explain all aspects of the award. *Perdue, supra* at 1666.

215. A fee enhancement is appropriate in this case. The overall representation of the Debtor by Baker Botts was outstanding. The bankruptcy case itself was rare and exceptional, beginning with minimal prospect of recover and ending with 100% pay out to creditors. The environmental claims were the largest ever in a bankruptcy case. The SCC litigation resulted in the largest fraudulent conveyance judgment ever in a bankruptcy case. The return to creditors was far more than expected. The rates charged by Baker Botts were below market rate because the Firm customarily collects premium rates or enhancements in non-bankruptcy representations.

216. Baker Botts requested that the Court calculate the enhancement by increasing its hourly rate by 20%. Such an approach has been approved by courts in the past. However, much of the work in this case, although

outstanding, is the type of professional legal work expected of a national law firm such as Baker Botts. Enhancement should reward rare and exceptional work and should be tied to both the effort and the outcome. In addition, much of the success in this case is due to a coalescence of factors beyond the work of Baker Botts.

217. As this Court previously found, the Parent's full-payment plan was attributable to a number of factors, including:

- A well-timed and substantial rise in copper prices in 2009;
- The SCC Judgment;
- The Parent's desire to retain ownership and control of ASARCO LLC and move to a full-payment plan;
- The Parent's strong desire to bring an end to the costly, time-consuming and distracting litigation involving the environmental claims and asbestos claims;
- This Court and how this Court conducted the case; and
- Other participants, constituents, professionals, and attorneys.

218. However, Baker Botts was directly responsible for the successful recovery in the SCC litigation which resulted in recovery of a substantial asset for the estate. The case was tried to conclusion with outstanding representation by both sides. An enhancement based upon a 20% upward adjustment of the hourly rate for the SCC

litigation services is appropriate and results in a fee enhancement of $4,161,708.96.[103]

F. Preparation and Defense of the Final Fee Application

219. Section 330(a)(6) of the Bankruptcy Code states that the Court may award to a professional employed under section 327 compensation for the preparation of a fee application based on the level and skill reasonably required to prepare the application.[104] Though there is no binding Fifth Circuit authority on the issue and there is a split in authority in other jurisdictions, the better-reasoned cases have concluded that section 330(a)(6) authorizes a bankruptcy court to award a professional fees and expenses for defending a fee application if the professional is successful. Reorganized ASARCO's counsel agreed with this proposition at a hearing held on April 23, 2010:

> [W]e clearly acknowledge that the professional firms employed at the expense of the estate are entitled to reasonable compensation to pursue approval of their final fee applications and that the reorganized Debtor has assumed responsibility under the plan and the various implementing orders, your Honor, that you have entered to satisfy the fees that are allowed.[105]

220. The rule that a bankruptcy lawyer may recover costs for successfully litigating a fee application originated in the Ninth Circuit. In *Boldt v. Crake (In re Riverside-Linden Investment Co.)*, 945 F.2d 320 (9th Cir. 1991), the Ninth Circuit held that the bankruptcy court

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[103] 58,781.2 (hours expended on the SCC Litigation) x $70.80 (20% hourly fee enhancement) = $4,161,708.96

[104] 11 U.S.C. 330(a)(6).

[105] Hr'g Tr. 31:24–32:5, April 23, 2010 (R. Moore).

did not abuse its discretion in disallowing fees incurred in an unsuccessful defense of a fee application.[106] A decade later, the Ninth Circuit revisited the issue-but this time with a fee applicant that was successful in its defense of its fee application.[107] The Ninth Circuit awarded the fee applicant its fees in connection with the defense of its fee application, reasoning:

> Failure to grant fees for successfully defending challenges to an authorized fee application would dilute fee awards, in violation of section 330(a), and this would reduce the effective compensation of bankruptcy attorneys to levels below the compensation available to attorneys generally.[108]

221. Numerous other courts have followed this rule.[109] The Court has not identified any published cases within

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[106] *Boldt v. Crake (In re Riverside-Linden Inv. Co.)*, 945 F.2d 320, 323 (9th Cir. 1991).

[107] *See Smith v. Edwards & Hale, Ltd. (In re Smith)*, 317 F.3d 918, 928 (9th Cir. 2002), *abrogated on other grounds by Lamie v. United States Tr.*, 540 U.S. 526, 531–39 (2004).

[108] *In re Smith*, 317 F.3d at 928.

[109] *See, e.g., Boyd v. Engman (In re Engman II)*, 404 B.R. 467, 82–83 (W.D. Mich. 2009) (defending attorney fee applications is "part and parcel with the attorney's role in the administration of the bankruptcy process" and compensable under the Bankruptcy Code); *Hennigan Bennett & Dorman LLP v. Goldin Assocs. L.L.C. (In re Worldwide Direct Inc.)*, 334 B.R. 108, 111–12 (D. Del. 2005) (allowing fees incurred in successful defense of fee application); *Big Rivers Elec. Corp. v. Schilling (In re Big Rivers Elec. Corp.)*, 252 B.R. 670, 675 (W.D. Ky. 2000) (same); *In re Buckridge*, 367 B.R. 191, 207 n.26 (Bankr. C.D. Cal. 2007) (same); *In re 14605, Inc.*, No. 05-11910, 2007 WL 2745709, at * 8–9 (Bankr. D. Del. Sept. 19, 2007) (same); *In re Atwell*, 148 B.R. 483, 491–92 (Bankr. W.D. Ky. 1993) (same); *In re Hutter Constr. Co.*, 126 B.R. 1005, 1013 (Bankr. E.D. Wis. 1991) (same); *In re DN Assocs.*, 165 B.R. 344, 355 (Bankr. D. Me. 1994) (denying compensation for unsuccessfully defending against an objection to fees); *In re Courson*, 138 B.R. 928, 936 (Bankr. N.D. Iowa

the Fifth Circuit directly addressing the issue, but bankruptcy courts within the Fifth Circuit—including this Court—have granted applicants' requests for fees and expenses incurred in connection with defending their fee applications.[110]

222. Courts also have awarded compensation of fees and expenses incurred in the successful defense of applications to increase the applicant's base fee request.[111] In the *Big Rivers* case, the district court denied fees incurred in defending a fee enhancement request that was reversed on appeal.[112] However, the district court engaged in a lengthy discussion about when a fee applicant may be awarded its defense costs.[113] Making no distinction between the base application and the fee enhancement request, the district court in *Big Rivers* allowed defense costs for the base application because the base fees were affirmed but denied defense costs for the fee enhancement request because the fee enhancement award was reversed.[114]

223. Compensating bankruptcy lawyers for successfully defending their fee applications is necessary to

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1992) (same); *In re Great Sweats, Inc.*, 113 B.R. 240, 245–46 (Bankr. E.D. Va. 1990) (same); *In re Watervliet Paper Co.*, 109 B.R. 733, 735 (Bankr. W.D. Mich. 1989) (same).

[110] *See, e.g., Scotia Dev., LLC, et al.*, Case No. 07-20027, Dkt. No. 3897 (Nov. 24, 2008) (order granting supplemental fee application for defense costs).

[111] *See In re Vista Foods USA, Inc.*, 234 B.R. 121, 135 (Bankr. W.D. Okla. 1999) (awarding compensation for time and effort in relation to application for upward fee adjustment); *In re Buckridge*, 367 B.R. 191, 207 n.26 (Bankr. C.D. Cal. 2007) (awarding fees incurred defending a final fee application that included a fee enhancement request).

[112] *See In re Big Rivers Elec. Corp.*, 252 B.R. at 675.

[113] *See In re Big Rivers Elec. Corp.*, 252 B.R. at 675.

[114] *See In re Big Rivers Elec. Corp.*, 252 B.R. at 675.

avoid unfair dilution of professionals' fees.[115] Bankruptcy involves a unique process whereby a lawyer who is compensated by the bankruptcy estate must publicly file his fee statements, and multiple parties are given the opportunity to object to those fees. A non-bankruptcy lawyer would not be subject either to the same level of scrutiny or to the same number of potential objectors. Bankruptcy lawyers would be unfairly prejudiced—and the goal of compensating bankruptcy lawyers the same as non-bankruptcy lawyers would be undermined—by a rule that does not allow bankruptcy lawyers to recover costs for defending their fee applications in a process required by statute. One district court provided a succinct justification for allowing bankruptcy lawyers to recover costs for successfully litigating their fee applications:

> [T]he unambiguous policy inspiring Section 330(a) . . . is that professionals and para-professionals in bankruptcy cases should earn the same income as their non-bankruptcy counterparts. That policy cannot be vindicated through the rule expressed by the Bankruptcy Court in this case. If compensation is not permitted for fees incurred in defending a fee application, creditors could negotiate reductions in these fee awards knowing full well that the attorney is in a no-win situation. Even if the attorney prevails, he or she will in effect have financed the litigation without any hope of surviving it whole.[116]

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[115] *See In re Downs & Assocs.*, Ltd, No. 02-32905, 2002 WL 32139302, at *3 (Bankr. W.D.N.C. Dec. 11, 2002); *Sloan v. Hoffman (In re Chavez)*, 157 B.R. 30, 33 (D. Colo. 1993).

[116] *In re Worldwide Direct Inc.*, 334 B.R. 108, 111 (D. Del. 2005) (citations and quotations omitted); *see also In re Computer Learning Ctrs., Inc.*, 285 B.R. 191, 224 (Bankr. E.D. Va. 2002) ("Congressional objective of compensating professionals the same whether they are engaged in a bankruptcy case or in a non-bankruptcy matter [is] fur-

Denying fees incurred in defending fee applications would provide an incentive for parties in interest to mount objections to extract a fee reduction.[117]

224. Some courts have denied recovery of fees incurred in defending a fee application in bankruptcy, reasoning that those fees are not specifically allowed by section 330 of the Bankruptcy Code.[118] These courts have held that in the absence of a statutory or common law exception, the American Rule that parties bear their own litigation costs applies to litigation over a fee application in a bankruptcy case.[119] Two bankruptcy judges in the Northern District of Texas have adopted this rule on the theory that the American Rule prevents recovery of defense costs in bankruptcy.[120]

225. In the *Engman II* case, a district court judge held that these cases are contrary to the "underlying purpose of Section 330(a) and other federal statutes allowing for attorney fees" because those statutes "show

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thered by allowing additional fees to successfully present, prosecute or defend a fee application in appropriate circumstances."); *In re 14605, Inc.*, 2007 WL 2745709 at *9.

[117] *In re Worldwide Direct Inc.*, 334 B.R. at 111; *see also In re Riverside-Linden Inv. Co.*, 945 F.2d at 323 (opining that denying the applicant fees for defending against frivolous objections would only encourage parties to file meritless objections).

[118] *See, e.g., In re St. Rita's Assoc. Private Placement, L.P.*, 260 B.R. 650, 652 (Bankr. W.D.N.Y. 2001).

[119] *See In re St. Rita's Assoc. Private Placement, L.P.*, 260 B.R. at 652; *see also In re Brous*, 310 B.R. 563, 572 (Bankr. S.D.N.Y. 2007) (trustee failed to justify a departure from the American Rule where objections to the fee award were made in good faith and were largely meritorious).

[120] *See Frazin v. Haynes & Boone LLP (In re Frazin)*, 413 B.R. 378 (Bankr. N.D. Tex. 2009); *In re JNS Aviation LLC*, No. 04-21055, 2009 WL 80202 (Bankr. N.D. Tex. Jan. 9, 2009); *In re Teraforce Tech. Corp.*, 347 B.R. 838 (Bankr. N.D. Tex. 2006).

that [time spent defending a fee application] is necessary and beneficial to the bankruptcy system as a whole, and indirectly, to each estate participating in the system."[121] Preventing recovery of prosecution costs would allow an objecting party-in-interest to extract unwarranted fee reductions from a fee applicant by placing the applicant in a no-win situation: the resources the applicant would expend fighting objections could quickly overtake the value of the reduction the objector sought.[122]

226. Reorganized ASARCO's objections placed Baker Botts in the very "no-win situation" that the *Engman II* court envisioned when it reversed the bankruptcy court. Denying recovery of fees incurred in defending a fee application "would undoubtedly compromise" and "might also deter" competent lawyers and firms like Baker Botts from taking on long-term, complex bankruptcy cases such as this one.[123]

227. This Court is not bound by the Northern District of Texas bankruptcy cases and refuses to apply the holdings in those cases here for the same statutory, policy, and fairness reasons articulated by the district court in *Engman II*. Allowing Baker Botts to recover its fees and costs incurred in this litigation is consistent with the policy driving section 330 of the Bankruptcy Code and provides an actual benefit to the bankruptcy estates and the bankruptcy system as a whole.

228. The Court further concludes that the line of cases holding that a fee applicant is entitled to compensation for the successful defense of a fee application also applies

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[121] *In re Engman II*, 404 B.R. at 483 (reversing a bankruptcy court following the rule denying recovery of fees incurred in prosecuting a fee application).

[122] *In re Engman II*, 404 B.R. at 483.

[123] *See Engman II*, 404 B.R. at 483.

to the prosecution of an enhancement. Moreover, as discussed above, section 330 of the Bankruptcy Code requires the Court to determine Baker Botts' reasonable compensation, and the lodestar analysis, in addition to the factors set forth in section 330, is the vehicle by which the Court must make that determination.

229. No published opinion in the Fifth Circuit has addressed the issue of whether the amount a fee applicant may recover in prosecution costs is capped. Some courts outside the Fifth Circuit have imposed such a cap ranging from 3% to 7.5% for ordinary cases, but no uniform rule has emerged on the amount of the limitation.[124] "Courts either do not provide a rationale for the specific percentage limitation or adopt rationales [based on reasonableness]."[125]

230. Even those bankruptcy courts that impose a cap on the amount of fees that may be recovered for defending a fee application generally do so "in the absence of unusual circumstances."[126] These cases present the "unu-

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[124] *Coulter v. Tennessee*, 805 F.2d 146, 151 (6th Cir. 1986) (holding in a federal-fee shifting case that fees should be limited to "3% of the hours in the main case when the issue is submitted . . . without a trial and should not exceed 5% of the hours . when a trial is necessary"); *In re Bass*, 227 B.R. 103, 109 (Bankr. E.D. Mich. 1998) (following the 5% rule in the absence of extraordinary circumstances); *In re Atwell*, 148 B.R. 483, 491–92 (Bankr. W.D. Ky. 1993) (following the 5% rule); *In re Churchfield Mgmt. & Inv. Corp.*, 98 B.R. 838, 866 (Bankr. N.D. Ill. 1989) (holding that "in the absence of unusual circumstances, the hours allowed for preparing and litigating an attorney's fee application should not exceed three percent of the total hours applied for"); *In re Chicago Lutheran Hosp. Ass'n*, 89 B.R. 719, 743 (Bankr. N.D. Ill. 1988) (awarding an applicant 7.5% of its total fees for pursuing its fee application).

[125] *In re CF & I Fabricators of Utah, Inc.*, 131 B.R. 474, 83 n.8 (Bankr. D. Utah 1991).

[126] *In re Churchfield Mgmt. & Inv. Corp.*, 98 B.R. at 866.

sual circumstances" that cause percentage cap courts to deviate from their self-imposed limits. Baker Botts has been forced to respond to Reorganized ASARCO's challenges to over $20 million of the fees and expenses that Baker Botts charged to the estates during the Application Period.[127]

231. However, the Court concludes that the fees and expenses that Baker Botts has requested for preparing and defending the Fee Application through July 13, 2010, are higher than were reasonable or necessary based on the level and skill reasonably required to prepare and defend the Fee Application. The amounts sought by Baker Botts for preparing and defending the Fee Application through July 13—including the enhancement—reflect the actual billable time expended by Baker Botts and the actual and necessary expenses incurred by Baker Botts in performing that work. However, the Court finds that the reasonable compensation for the actual, necessary services performed by Baker Botts in preparing and defending the Fee Application through July 13, 2010, is $5,000,000 based on the level and skill reasonably required to prepare and defend the Fee Application.

232. The Court finally approves and allows $5,000,000.00 in fees and $457,443.83 in expenses requested by Baker Botts for preparing and defending the Fee Application through July 13, 2010.

233. Few cases have addressed whether a bankruptcy court may award a professional the costs he incurs in defending an appeal of a fee award. Of the handful of cases that have addressed this issue, the majority award defense costs to fee applicants for successfully defending a

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[127] *Amended Objection to Final Fee Application.*

fee award on appeal.[128] Like the cases that allow defense costs through the trial of a fee application, courts allow appellate defense costs to avoid an unfair dilution of the professional's base fee award.[129] The minority of cases deny such costs, reasoning that they benefit the law firm but not the estate.[130]

234. The Court agrees with the majority line of decisions and concludes that it may award appellate defense fees and expenses to Baker Botts if the Firm successfully defends the Court's fee award on appeal.

235. The Court will include in its final order resolving the Fee Application a provision authorizing Baker Botts to submit supplemental applications for additional defense fees and expenses incurred after July 13, 2010, upon resolution of any appeals or in connection with any subsequent proceedings in the event of a remand.

IV. CONCLUSION

236. The Court finds and concludes that:

- $6,046,135.06 in expenses incurred by Baker Botts during the Application Period were actual, necessary expenses;

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[128] *See, e.g.*, *In re Manoa Fin. Co., Inc.*, 853 F.2d 687, 692 (9th Cir. 1988) (appellant entitled to fees incurred in successfully appealing denial of fee award); *Nunley v. Jessee*, 92 B.R. 152, 154 (W.D. Va. 1988) (executrix for chapter 11 estate entitled to fees incurred in defending fee award on appeal); *see also In re Hers Cosmetics Corp.*, 114 B.R. 240, 244 (Bankr. C.D. Cal. 1990) (awarding fees incurred in defending claims on appeal and stating "reimbursement for reasonable attorneys fees incurred in defending a fee award on appeal should be available").

[129] *In re Hers Cosmetics Corp.*, 114 B.R. at 243–44.

[130] *See, e.g.*, *In re DN Assocs.*, 165 B.R. 344, 354–55 (Bankr. D. Me. 1994).

- The services summarized in the Fee Application and performed by Baker Botts during the Application Period were substantial and provided a tangible and material benefit to the estates;
- The fees sought by Baker Botts for the services it performed during the Application Period reflect the actual and reasonable billable time expended by Baker Botts during the Application Period in connection with these cases and do not reflect (1) any unnecessary duplication of services, or (2) services that were not (a) reasonably likely to benefit the estates or (b) necessary to the administration of the cases;
- The reasonable compensation for the actual, necessary services performed by Baker Botts during the Application Period is $117,613,158.44;
- $457,443.83 in expenses incurred by Baker Botts in preparing and defending the Fee Application through July 13, 2010, were actual, necessary expenses;
- The fees sought by Baker Botts for preparing and defending the Fee Application through July 13, 2010, reflect the actual time expended by Baker Botts for preparing and defending the Fee Application. However, the Court finds that the reasonable compensation for the actual, necessary services performed by Baker Botts in preparing and defending the Fee Application through July 13, 2010, is $5,000,000 based on the level and skill reasonably required to prepare and defend the Fee Application.

237. The Court finally approves and allows $117,613,158.44 in fees and $6,046,135.06 in expenses for

services performed and expenses incurred by Baker Botts during the Application Period. The $117,131,158.44 fee award is comprised of (1) $113,074,527.74 in fees approved by this Court on an interim basis under section 331 of the Bankruptcy Code and paid to Baker Botts; (2) *plus* $263,994.74 in additional, unpaid fees incurred by Baker Botts for the period of November 1, 2009, through December 8, 2009; (3) *plus* $4,161,708.96 as an enhancement because there are rare and extraordinary circumstances in these cases and Baker Botts' services in the SCC litigation were instrumental in producing the exceptional results that were unanticipated at case commencement.; (4) *minus* $112,927.00 in fees charged by Baker Botts to the estates, for which Baker Botts has agreed voluntarily to credit the estates The $6,046,135.06 expense award is comprised of (1) $6,065,598.58 in expenses approved by this Court on an interim basis under section 331 of the Bankruptcy Code and paid to Baker Botts; (2) *minus* $19,463.52 in expenses charged by Baker Botts to the estates, for which Baker Botts has agreed voluntarily to credit the estates.

238. The Court finally approves and allows $5,000,000.00 in fees and $457,443.83 in expenses incurred by Baker Botts in preparing and defending the Fee Application through July 13, 2010.

239. In the event of an appeal, Baker Botts may file a supplemental fee application.

240. The Court orders Baker Botts to prepare and submit an order consistent with these findings within ten (10) days from the date of entry of this Memorandum Opinion.

DATED: JUL 20 2011

[Signature]

RICHARD S. SCHMIDT
United States Bankruptcy Judge

APPENDIX D

UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS CORPUS CHRISTI DIVISION

Case No. 05-21207
Chapter 11
Jointly Administered

IN RE:

ASARCO, LLC, ET AL.
Debtors.

(September 27, 2012)

SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING BAKER BOTTS L.L.P.'S FINAL FEE APPLICATION

On August 8, 2012, the United States District Court for the Southern District of Texas affirmed in part and reversed in part this Court's *Order Granting Final Fee Application and Request for Fee Enhancement of Baker Botts L.L.P, Counsel to the Debtors*, entered on August 18, 2011 (Dkt. 16334) ("Original Judgment"). *See Memorandum Opinion and Order on the Final Fee Application of Baker Botts, L.L.P.*, Case No. 2:11-CV-290 (S.D. Tex. Aug. 8, 2012) (Dkt. 32) ("District Court Order").

The District Court remanded the case to allow this Court to make further findings regarding three discrete issues:

> (1) What portion, "if any," of this Court's award of "$5,000,000 in fees . . incurred by Baker Botts in preparing and defending the Fee Application through July 13, 2010," *see* Original Judgment at 3, constitutes an "award of fees for the pursuit of a fee enhancement." District Court Order at 24, 27.
>
> (2) What portion, "if any," of this Court's award of "$457,443.83 in expenses incurred by Baker Botts in preparing and defending the Fee Application through July 13, 2010," *see* Original Judgment at 3, constitutes an "award of expenses for the pursuit of a fee enhancement." District Court Order at 24, 27.
>
> (3) What portion, "if any," of this Court's award of "$5,000,000 in fees . . incurred by Baker Botts in preparing and defending the Fee Application through July 13, 2010," *see* Original Judgment at 3, constitutes an award "for the recreation of initially inaccurate or insufficient time records." District Court Order at 24, 27.

Originally, this Court found that Baker Botts requested and proved a total of $8,004,920.50 in fees related to defense of both its fee application and its request for a fee enhancement ($5,159,916.50 in defense of its fee application and $2,802,158.50 in defense of its enhancement request). Uncharacteristically, this Court did not engage in a mathematical exercise to determine the appropriate amount of those fees to award. Instead, the Court, using its discretion, found that it could not award an amount in excess of $5,000,000 for the defense of fees because it felt that the amount requested was too high in light of other decisions and the total amount of fees approved in the case. In doing so the Court did not make a percentage

reduction of any particular fee. In light of the District Court Order, the Court must now decide what reduction, if any, should be made to the fee defense request of $5,159,916.50. The Court still believes that, based upon the total fees approved in this case, an award of $5,000,000 is appropriate. Based on the record before the Court and the foregoing explanation, the Court finds, concludes, and clarifies that:

(1) None of the Court's award of $5,000,000 in fees incurred by Baker Botts in preparing and defending the Fee Application through July 13, 2010, is an award of fees for the pursuit of a fee enhancement. That entire award is for "defending the fees that had been approved [by the Court] on an interim basis and those sought through December 8, 2009." District Court Order at 5. The reasonable compensation for the actual, necessary services performed by Baker Botts in defending the fees that had been approved by the Court on an interim basis and those sought through December 8, 2009, is $5,000,000 based on the level and skill reasonably required to defend those fees.

(2) $255,213.23 of the Court's initial award of $457,443.83 in expenses incurred by Baker Botts in preparing and defending the Fee Application through July 13, 2010, was an award of expenses for the pursuit of a fee enhancement and should be eliminated from the amount of expenses awarded as instructed in the District Court Order. The remaining $202,230.60 was and continues to be an award of actual, necessary expenses incurred by Baker Botts for defending the fees that had been approved by the Court on an interim basis and those sought through December 8, 2009.

(3) None of the Court's award of $5,000,000 in fees incurred by Baker Botts in preparing and defending

the Fee Application through July 13, 2010, is an award of fees "for the recreation of initially inaccurate or insufficient time records." *Id.* at 24. Baker Botts' time records were not initially "inaccurate," "incorrect[]," "insufficient," "vague," "clumped," "non-compliant," or "otherwise deficient." *Id.* at 22-24. As the Court explained in its *Memorandum Opinion on Final Fee Application of Baker Botts L.L.P.*, entered on July 20, 2011 (Dkt. 16249), Reorganized ASARCO's objections regarding the specificity of Baker Botts' billing entries were "without merit." Memorandum Opinion at 43. "[T]he level of detail submitted by Baker Botts [was] sufficient," even without considering Baker Botts' supplemental time entries. *Id.* at 44. Reorganized ASARCO's objections regarding block-billing were also "without merit." *Id.* at 45. "The evidence submitted by Baker Botts and the record as a whole contain[ed] ample information allowing the Court to assess the reasonableness of requested fees," even without considering Baker Botts' supplemental time entries. *Id.* at 46. "Billing entries identified by [Reorganized ASARCO's expert] Mr. Meckler as vague were identified as not vague by [Reorganized ASARCO's other expert] Judge Monroe, who has considerably more experience in evaluating fee requests in bankruptcy." *Id.* at 43. "When presented with billing entries identified as impermissibly clumped by Mr. Meckler, Judge Monroe did not believe that such entries were inappropriate." *Id.* at 45. While Baker Botts' supplemental billing descriptions "support[ed] the conclusion that the requested fees [were] reasonable," the Fee Application "contained sufficient information without [those] descriptions." *Id.* Baker Botts clarified its time records to refute Reorganized ASARCO's meritless objection.

The Court will reform its final order consistent with this opinion and the District Court's Order.

DATED: SEP 27 2012

[Signature]
RICHARD S. SCHMIDT
United States Bankruptcy Judge

APPENDIX E

UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS CORPUS CHRISTI DIVISION

Case No. 05-21207
Chapter 11
Jointly Administered

IN RE:

ASARCO, LLC, ET AL.
Debtors.

(September 27, 2012)

ORDER ON REMAND GRANTING FINAL FEE APPLICATION AND REQUEST FOR FEE ENHANCEMENT OF BAKER BOTTS L.L.P., COUNSEL TO THE DEBTORS

Upon consideration of the *Final Fee Application of Baker Botts, L.L.P., Counsel for the Debtors, for Allowance and Payment of Compensation for Services Rendered and Reimbursement of Expenses Incurred for the Period August 9, 2005 Through December 8, 2009*, filed on February 8, 2010, as amended or supplemented (the "Fee Application"), the Court **FINDS** that:

A. The Court has jurisdiction over this Fee Application under 28 U.S.C. §§ 157 and 1334.

B. This is a core proceeding pursuant to 28 U.S.C. §157(b).

C. Venue is proper in this district under 28 U.S.C. §§ 1408 and 1409.

D. Baker Botts was properly retained as counsel to the Debtors for the pendency of the above-captioned case under 11 U.S.C. § 327(a).

E. Due notice and opportunity to be heard were given respecting the Fee Application.

F. Entry of this Order is based upon, without limitation, the following: (a) the Court's review of, familiarity with, and judicial notice of the entire record in the above-captioned bankruptcy case and all related cases, contested matters, and adversary proceedings; (b) the Fee Application (including exhibits), responses, briefs, and other written arguments and evidence submitted to the Court relating to the Fee Application; (c) arguments and evidence presented at the hearings on the Fee Application; and (d) the Court's considered judgment and experience gained in presiding over the case from its inception to present and presiding over numerous other complex chapter 11 reorganization cases and proceedings.

G. The findings and conclusions contained in the Court's *Memorandum Opinion on Final Fee Application of Baker Botts L.L.P* entered on July 20, 2011 (Dkt. 16249) (the "Fee Opinion") are incorporated herein by reference.

H. The findings and conclusions contained in the Court's *Supplemental Findings of Fact and Conclusions of Law Regarding Baker Botts L.L.P.'s Final Fee Application* entered contemporaneously herewith (the "Sup-

plemental Findings") are incorporated herein by reference.

I. The findings and conclusions set forth herein and in the Fee Opinion as modified by the Supplemental Findings constitute the Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable to this proceeding by Bankruptcy Rule 9014.

J. Any finding of fact set forth herein or in the Fee Opinion or Supplemental findings shall constitute a finding of fact even if it is stated as a conclusion of law; any conclusion of law set forth herein or in the Fee Opinion or Supplemental Findings shall constitute a conclusion of law even if it is stated as a finding of fact.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The Court finally approves and allows as administrative expenses entitled to priority under the applicable provisions of the United States Bankruptcy Code $117,387,304.44 in fees[1] and $6,046,135.06 in expenses for services performed and expenses incurred by Baker Botts during the Application Period (as defined in the Fee Application). The $117,387,304.44 fee award is comprised of (1) $113,074,527.74 in fees approved by this Court on an interim basis under section 331 of the Bankruptcy Code and paid to Baker Botts; (2) *plus* $263,994.74

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[1] The Fee Opinion contains typographical errors indicating a total fee amount (not including fees for defense of the Fee Application) of $117,613,158.44 in one place and $117,131,158.44 in another. *See* Fee Opinion at 74, ¶ 237. Neither of these is correct. The correct number is $117,387,304.44. In its *Order Granting Final Fee Application and Request for Fee Enhancement of Baker Botts L.L.P, Counsel to the Debtors*, entered on August 18, 2011 (Dkt. 16334), the Court amended the Fee Opinion to substitute the correct number of $117,387,304.44 where incorrectly stated previously.

in additional unpaid fees incurred by Baker Botts for the period of November 1, 2009 through December 8, 2009; (3) *plus* $4,161,708.96 as an enhancement because there are rare and extraordinary circumstances in these cases and Baker Botts' services in the SCC Litigation were instrumental in producing the exceptional results that were unanticipated at case commencement; (4) *minus* $112,927.00 in fees charged by Baker Botts to the estates, for which Baker Botts has agreed voluntarily to credit the estates. The $6,046,135.06 expense award is comprised of (1) $6,065,598.58 in expenses approved by this Court on an interim basis under section 331 of the Bankruptcy Code and paid to Baker Botts; (2) *minus* $19,463.52 in expenses charged by Baker Botts to the estates, for which Baker Botts has agreed voluntarily to credit the estates.

2. In addition, the Court finally approves and allows as administrative expenses entitled to priority under the applicable provisions of the United States Bankruptcy Code $5,000,000 in fees and $202,230.60 in expenses incurred by Baker Botts in defending the fees that had been approved on an interim basis and those sought through December 8, 2009.

3. The Court authorizes Baker Botts to file supplemental fee applications for additional fees and expenses incurred after July 13, 2010 in connection with any appeals or any subsequent proceedings in the event of a remand which relate to defense of its fee application but not to its request for enhancement.

4. Subject to the *Amended Order Approving Plan Administrator's Amended Funds Flow Memorandum Pursuant to Section 10.4 of the Parent's Plan and Paragraph 105 of Confirmation Order* (Dkt 13441) (the "Amended Funds Flow Order"), the Plan Administrator

is authorized and directed to pay Baker Botts $9,495,543.78, representing the amount of fees and expenses (including fee enhancement) approved in this Order but which remains unpaid. This Order constitutes an Allowance Order as defined in the Amended Funds Flow Order.

5. For the reasons set forth in the Fee Opinion as modified by the Supplemental Findings, and except as otherwise provided in this Order, all objections to the Fee Application are overruled.

6. This Order is a final order subject to appeal under 28 U.S.C. § 158.

7. To the fullest extent permitted by law, the Court retains jurisdiction with respect to all matters arising from or related to the implementation and enforcement of this Order, including jurisdiction to award Baker Botts additional fees and expenses incurred in defense of any appeal of this Order or in connection with any appeals or any subsequent proceedings in the event of a remand.

Dated: SEP 27 2012

[Signature]
RICHARD S. SCHMIDT
United States Bankruptcy Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS BROWNSVILLE DIVISION

Case No. 2:11-CV-318
(previously docketed as 2:11-cv-290)
Bankruptcy Case No. 05-21207

IN RE:
ASARCO LLC,
Debtor.

ASARCO LLC,
Appellant.
v.
BAKER BOTTS, L.L.P
Appellee.

(March 26, 2013)

MEMORANDUM OPINION AND JUDGMENT

The Court now reconsiders this appeal by ASARCO, L.L.C. (hereinafter "ASARCO") after an initial remand by this Court of certain issues regarding the award to Baker Botts, L.L.P. (hereinafter "Baker Botts" or "the law firm") of certain attorneys' fees and expenses. The Court considers the relatively narrow question of whether the Bankruptcy Court adequately complied with this Court's direction on remand that it clarify and delete all

amounts, if any, of its original award of fees and expenses that were to compensate Baker Botts for the pursuit of a fee enhancement or the correction of allegedly deficient time records, work to which this Court ruled the law firm would not be entitled to fees. On remand, the Bankruptcy Court reduced its original award of $5,457,443.83 to $5,202,230.60, finding that $255,213.23 of the original amount had been awarded for the pursuit of a fee enhancement. The new amount of $5,202,230.60 was awarded only for compensable sources of work identified by this Court, and therefore this Court finds the new judgment of the Bankruptcy Court should be **AFFIRMED**.

I. Introduction and Case Background

Previously, this Court affirmed the Bankruptcy Court's decision to award Baker Botts additional compensation in addition to its agreed upon professional rates for its representation of ASARCO in *Southern Peru Holdings, LLC v. Americas Mining Corporation*, civil case of this Court B-07-18 (hereinafter "the SCC case"). That decision rested on Baker Botts's superlative performance in the case and the benefit conferred on the bankruptcy estate, circumstances this Court also found were rare and extraordinary. As earlier expressed by this Court, if ever there were a case which called for an enhancement, surely this was it. In its earlier decision this Court further held that one could receive attorneys' fees for the preparation and defense of its fee application, but not for the fees and expenses expended in seeking a fee enhancement, the latter being of no benefit to the bankruptcy estate. Rather than repeat its findings, that Opinion is incorporated herein. (Memorandum Opinion and Order, civil case 2:11-cv-290, Doc. 32). The matter was remanded to the Bankruptcy Court because it did

not delineate what part of the $5,000,000 in fees and $457,443.83 in expenses it had awarded were attributable to the preparation and defense of its fee application, and which, if any, were attributable to the pursuit of a fee enhancement or the correction of allegedly deficient time records.[1]

In its Supplemental Findings of Fact and Conclusions of Law Regarding Baker Botts's Final Fee Application, the Bankruptcy Court held that none of the award of $5,000,000 in fees incurred by Baker Botts in preparing and defending the Fee Application through July 13, 2010, was an award for the pursuit of a fee enhancement or for the correction of deficient time records. The Bankruptcy Court did find, however, that $255,213.23 of its initial award of $457,443.83 in expenses was an award for the pursuit of a fee enhancement, and should therefore be eliminated as per the prior Opinion of this Court. The Bankruptcy Court's revised judgment makes that correction.

II. Discussion of Issues on Appeal

The question presented in this subsequent appeal is, did the Bankruptcy Court err in awarding Baker Botts $5,000,000 in fees and $202,230.60 in expenses for defending its fee application for fees earned and expenses expended in the representation of ASARCO in the bankruptcy case? Appellant makes essentially three arguments in its Brief to support that proposition.

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[1] This Court found that keeping appropriate time records was an integral part of a lawyer's duty in these circumstances. As such, no debtor should have to pay a law firm additional legal fees and/or expenses to correct its own shoddy record keeping. Such fees would not benefit the estate and additionally would constitute an unnecessary duplication of services.

1. The Bankruptcy Court Attributed its Current Award Amount in Part to Improper Sources.

First, ASARCO argues that "[d]espite clear statements in the bankruptcy court's prior ruling that its award of $5,000,000 in fees to Baker Botts included fees for pursuing a fee enhancement, the bankruptcy court did not reduce its award of fees to Baker Botts on remand" (Brief of Appellant, 4). On remand, the Bankruptcy Court clearly explained in its Supplemental Findings how it had initially arrived at the fees and expenses awarded to Baker Botts:

> Uncharacteristically, this Court did not engage in a mathematical exercise to determine the appropriate amount of those fees to award. Instead, the Court, using its discretion, found that it could not award an amount in excess of $5,000,000 for the defense of fees because it felt that the amount requested was too high in light of other decisions and the total amount of fees approved in the case.

Doc. 16711, p. 2. The Bankruptcy Court went on to expressly state, "[n]one of the Court's award of $5,000,000 in fees incurred by Baker Botts in preparing and defending the Fee Application through July 13, 2010, is an award of fees for the pursuit of a fee enhancement." *Id.* The Bankruptcy Court found that the evidence presented supported a fee in excess of the $5,000,000 it awarded, but it capped the award at $5,000,000 as an exercise of its own discretion. The Bankruptcy Court thus answers this Court's request to delineate what portion of the $5,000,000 award of fees, if any, was attributable to work other than the preparation and defense of its fee application. Appellant's argument that the Bankruptcy Court attributed its current award amount in part to improper sources is unsubstantiated, and contrary to the direct

findings of the Bankruptcy Court. This Court also notes that such findings were supported by the evidence presented.

2. Fees for Litigating a Fee Application Should Be Overturned as a Matter of Law.

Second, Appellant argues that Baker Botts should not be entitled to fees incurred in preparing and defending a fee application, something ASARCO admits this Court has already decided to the contrary. Appellant raises this objection again simply to preserve the issue for appeal. This Court has discussed this issue at length in its previous Memorandum Opinion and Order, and sees no reason to depart from that earlier ruling.

3: Fees Spent Litigating a Fee Award on Remand or Appeal Should Not Be Included in an Award.

Third, Appellant argues that fees incurred litigating a fee application on appeal or on remand should not be allowed, characterizing them as "fees on fees on fees" and "a third tier of fees" (Brief of Appellant, 9). This is a new argument. In its August 18, 2011, Order, the Bankruptcy Court "authorize[d] Baker Botts to file supplemental fee applications for additional defense fees and expenses incurred after July 13, 2010 in connection with any appeals or any subsequent proceedings in the event of a remand" (Doc. No. 16334, p. 3). Appellant argues this would lead to further iterations of fees, which would "encourage an endless cycle of fee litigation." (Brief of Appellant, 9).

First, this Court finds this "ruling" by the Bankruptcy Court to be at most its permission to file an application for fees. It is not the award of any fees or expenses nor is it an indication that the Court would grant such an award if requested. As a rule, the basic policy of federal courts is that an appeal will only lie from a "final decision."

Cobbledick v. United States, 309 U.S. 323, 324 (1940). "A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). In *City of Detroit v. Grinnell Corp.*, the Second Circuit considered an issue similar to that presented by Appellant and found that "a final judgment will arise only when the District Court makes a final apportionment of the fee." 495 F. 2d 448, 475 (2d Cir. 1974) (abrogated on other grounds). As such, there is no appealable issue to be considered. The entire matter is not ripe for consideration.

Second, and assuming hypothetically that this ruling were appealable, whether work spent on appeal defending the fees awarded for successfully defending a fee application is entitled to attorney fees is, unsurprisingly, not explicitly addressed by § 330. Courts essentially fall into two camps when deciding whether to award fees spent successfully defending a fee application, whether at the first stage, or any number of successive appellate stages. The majority position, adopted by this Court in its previous Opinion, reasons that fee applicants must be entitled to recover fees spent defending those fees, as long as their application is successful. To withhold fees at any stage or appeal or proceeding from an applicant with a successful fee application would unfairly dilute the original fee award. In turn, competent counsel would be dissuaded from choosing bankruptcy cases, a result opposite the intent of Congress when it drafted § 330. This is true whether the application is defended at the trial court level or on appeal. *See, e.g.*, *Nunley v. Jessee*, 92 B.R. 152 (W.D. Va. 1988) (reversing bankruptcy court's refusal to consider award of fees for successful defense of fee award on appeal), *In re U.S. Golf Corp.*, 639 F.2d

1197, 1208 (5th Cir. 1981) (awarding fees on appeal to successful trustee's counsel without discussion), *In re Manoa Finance Co., Inc.*, 853 F. 2d 687 (9th Cir. 1988) (ruling attorney fees should be granted for an appeal if the fee applicant prevails).

The minority position, advocated by the Appellant, argues that the American Rule should control in the absence of clear and explicit statutory authorization. A representative case cited by Appellant, *In re DN Associates*, 165 B.R. 344, 349 (Bankr. D. Me. 1994), is an example of a court which considered the argument above, but ultimately found it unpersuasive and chose not to award fees. "Bankruptcy professionals," it reasoned, "regularly face the risk of nonpayment or reduced payment for a variety of reasons." *Id.* at 354. Appellant asks this Court to adopt the minority position in this circumstance.

As Appellee points out, however, this Court has already held that this latter approach is the less well reasoned interpretation of the statute, especially considering the legislative intent that bankruptcy attorneys be compensated commensurate with attorneys in other fields. Appellant's argument that attorney fees should not be awarded for fee appeals, even if successful, lacks persuasive authority. This Court follows the majority of courts in holding that fees for the successful defense of a § 330 fee appeal are recoverable, at any stage of the case. To give anything less would fall short of making a law firm whole for its original fee award.

The additional infirmity in Appellant's argument that Baker Botts should not be entitled to fees on appeal or remand is that such awards would apply only insofar as ASARCO chooses to continue litigating and continues to lose. Further tiers of fees, as ASARCO terms them, could only be awarded when, and if, ASARCO continues

to object, and appeal (and lose). The existence of a new "tier" is solely up to the discretion of ASARCO and whether it takes a legal position forcing the Appellee to respond. To deny the law firm fees each time it is forced to respond to some issue in a different court would dilute Baker Botts's core fees, an outcome this Court has already held Appellee should not be forced to bear. This Court affirms its previous ruling that "the time spent defending a fee application 'is necessary and beneficial to the bankruptcy system as a whole, and indirectly, to each estate participating in the system'" (Memorandum Opinion and Order, p. 20) (citing *In re Engman II*, 404 B.R. 467, 483 (W.D. Mich. 2009)). Therefore, assuming that there actually is an appealable issue, which this Court does not find, this Court holds that a court may award attorney fees for the successful trial and/or appellate defense of fees awarded as part of a fee application.

III. Conclusion

The Bankruptcy Court originally awarded Baker Botts an enhancement for its representation of ASARCO in the SCC case, in which it reached a result that all parties have agreed were both rare and extraordinary. The debtor emerged from bankruptcy as a financially sound, functioning entity. All of the creditors were completely paid (including interest and attorneys' fees). Overall, the result was positive and unexpected, and perhaps the single most successful in American bankruptcy history. Even so, the Bankruptcy Court did not award an enhancement based upon the overall body of work performed in the bankruptcy case; instead, the Bankruptcy Court limited the enhancement to the work performed in the SCC fraudulent transfer litigation. According to the Bankruptcy Court, this superlative result was attributable in no small part to the performance of the attorneys

of Baker Botts and the result obtained in the SCC case, and not to any factors that might otherwise make a substantial victory easier (as was the case in *Perdue v. Kenny*, __ U.S. __, 130 S.Ct. 1662 (2010)). This Court reiterates its previous ruling that there is an abundance of evidence which supports the Bankruptcy Court's decision to award Baker Botts an enhancement for its representation in the SCC case. This Court also earlier denied the recovery of post judgment interest by the law firm, a holding this Court now reaffirms.[2]

Subsequently, the Bankruptcy Court has clarified that none of its initial $5,000,000 fee award for the preparation and defense of the fee application was expended for the pursuit of a fee enhancement, but rather was entirely for the preparation and defense of Baker Botts's fee application. The Bankruptcy Court did find, however, that $255,213.23 of its initial award of $457,443.83 in expenses was an award for the pursuit of a fee enhancement, and accordingly reduced that award as instructed by this Court. While the Bankruptcy Court used its discretion in capping the fee request, instead of a precise mathematical calculation to arrive at its award of fees, the evidence does support that Baker Botts's expenditures were at least in excess of that amount. See Declaration of James R. Prince, Doc. No. 15188-11, p. 5-9. While this might be a somewhat unusual approach, Baker Botts would be the

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[2] These rulings, including the ruling reargued here regarding fees for defending a fee application, have actually already been appealed. See Case No. 12-40997, *ASARCO, LLC v. Jordan, Hyden et. al.*, and Case No. 12-40998, *ASARCO, LLC v. Baker Botts, LLP*, pending in the Fifth Circuit Court of Appeals. This Court reiterates here that this Judgment makes both orders final, in case the Fifth Circuit finds these first two appeals to be premature.

only entity harmed by such a technique and it has not objected as to that methodology.

The total amount awarded by the Bankruptcy Court, $9,495,543.78, equals the original amount awarded by that Court's Order dated August 18, 2011 (Doc. No. 16334), $9,750,757.01, minus the $255,213.23 the Bankruptcy Court found should be eliminated. No party has questioned or objected to the actual calculations performed by the Bankruptcy Court, so this Court will assume they are accurate and hereby affirms the award of $9,495,543.78. This figure represents the unpaid amount of fees and expenses expended in the preparation and defense of its fee application and the fee enhancement approved by the Bankruptcy Court and upheld by this Court.

Finally, this Court finds ASARCO's complaint regarding any future fee application is not ripe. No application has been made, and no fees have been awarded. It is therefore the judgment of this Court that the Bankruptcy Court's Order on Remand (Doc. No. 16712) should be **AFFIRMED**. Given that this Order incorporates the Memorandum Opinion and Order of this Court dated August 8, 2012, these two Orders together form a final and appealable judgment on all issues in the controversy.

Signed and ordered this the 26th day of March, 2013.

[Signature]
Andrew S. Hanen
United States District Judge

APPENDIX G

A. Cases authorizing compensation for defending fee applications

1. *In re Bible Deliverance Evangelistic Church*, 39 B.R. 768 (Bankr. E.D. Pa. 1984)
2. *In re S.T.N. Enters. Inc.*, 70 B.R. 823 (Bankr. D. Vt. 1987)[1]
3. *Nunley* v. *Jessee*, 92 B.R. 152 (W.D. Va. 1988)
4. *In re Chicago Lutheran Hosp. Ass'n*, 89 B.R. 719 (Bankr. N.D. Ill. 1988)
5. *In re Churchfield Mgmt. & Inv. Corp.*, 98 B.R. 838 (Bankr. N.D. Ill. 1989)
6. *In re CF & I Fabricators of Utah, Inc.*, 131 B.R. 474 (Bankr. D. Utah 1991)
7. *In re Hutter Constr. Co.*, 126 B.R. 1005 (Bankr. E.D. Wis. 1991)
8. *In re Atwell*, 148 B.R. 483 (Bankr. W.D. Ky. 1993)
9. *In re Concrete Prods., Inc.*, No. 88-20540, 1993 WL 13726054 (Bankr. S.D. Ga. July 27, 1993)
10. *In re Ricci Inv. Co., Inc.*, 217 B.R. 901 (D. Utah 1998)
11. *Big Rivers Elec. Corp.* v. *Schilling (In re Big Rivers Elec. Corp.)*, 252 B.R. 670 (W.D. Ky. 2000)

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[1] The court deferred any award of fees pending supplementation of the final fee application. *In re S.T.N. Enters. Inc.*, 70 B.R. at 845.

12. *In re Geneva Steel Co.*, 258 B.R. 799 (Bankr. D. Utah 2001)

13. *In re Downs & Assocs., Ltd.*, No. 02–32905, 2002 WL 32139302 (Bankr. W.D.N.C. Dec. 11, 2002)

14. *In re Moss*, 320 B.R. 143 (Bankr. E.D. Mich. 2005)

15. *Hennigan Bennett & Dorman LLP* v. *Goldin Assocs. L.L.C. (In re Worldwide Direct Inc.)*, 334 B.R. 108 (D. Del. 2005)

16. *In re DIMAS, LLC*, 357 B.R. 563 (Bankr. N.D. Cal. 2006), aff'd in part, rev'd in part, *In re DIMAS, LLC*, Nos. NC-08-1073-DJUMK, 02-51420, 2009 WL 7809032 (B.A.P. 9th Cir. Feb. 25, 2009)

17. *In re Walters*, No. BKR. 04-06902-JM7, 2006 WL 6589027 (Bankr. S.D. Cal. May 30, 2006)

18. *In re Ahead Commc'ns Sys., Inc.*, No. 02-30574, 2006 WL 2711752 (Bankr. D. Conn. Sept. 21, 2006)

19. *In re Buckridge*, 367 B.R. 191 (Bankr. C.D. Cal. 2007)

20. *In re 14605, Inc.*, No. 05–11910, 2007 WL 2745709 (Bankr. D. Del. Sept. 19, 2007)

21. *In re Smith*, No. 97-62183-AER7, 2008 WL 2852263 (Bankr. D. Or. July 23, 2008)

22. *In re Schneider*, No. 06-50441-MM, 2008 WL 4447092 (Bankr. N.D. Cal. Sept. 26, 2008)

23. *Boyd* v. *Engman (In re Engman II)*, 404 B.R. 467 (W.D. Mich. 2009)

24. *In re CCT Comc'ns, Inc.*, No. 07-10210 SMB, 2010 WL 3386947 (Bankr. S.D.N.Y. Aug. 24, 2010)

25. *In re Kahuku Hosp.*, No. 07-00176, 2011 WL 5884144 (Bankr. D. Haw. Nov. 23, 2011)

26. *In re Millennium Multiple Emp'r Welfare Benefit Plan*, 470 B.R. 203 (Bankr. W.D. Okla. 2012)

27. *In re Shalan Enters., LLC*, No. 2:09-BK-43263-PC, 2012 WL 1345328 (Bankr. C.D. Cal. Apr. 17, 2012)

28. *In re Lupo*, No. 09-21945-JNF, 2012 WL 1682571 (Bankr. D. Mass. May 14, 2012)

29. *In re Quigley Co., Inc.*, 500 B.R. 347 (Bankr. S.D.N.Y. 2013)

30. *In re Wiczorek*, No. 12-13503, 2013 WL 1120019 (E.D. Mich. Mar. 17, 2013)

31. *Goodbar* v. *Beskin*, No. 5:12CV063, 2013 WL 1249124 (W.D. Va. Mar. 26, 2013)

32. *In re Merced Falls Ranch, LLC*, No. 11-19212-13-11, 2013 WL 3155448 (Bankr. E.D. Cal. June 20, 2013)

33. *In re GFI Commercial Mortg. LLP*, No. C 12-03956 SI, 2013 WL 4647300 (N.D. Cal. Aug. 29, 2013)

34. *In re Schupbach Invs.*, No. 11-11425, 2013 WL 5495577 (Bankr. D. Kan. Oct. 3, 2013)

35. *In re S. Lakes Dairy Farm*, No. 12-17458-B-11, 2014 WL 271635 (Bankr. E.D. Cal. Jan. 22, 2014)

36. *In re First State Bancorporation*, No. 7-11-11916 JA, 2014 WL 1203141 (Bankr. D.N.M. Mar. 24, 2014)

B. Cases denying fee-defense compensation for reasons other than lack of discretion

1. *In re Erewhon, Inc.*, 21 B.R. 79 (Bankr. D. Mass. 1982)
2. *In re Four Star Terminals, Inc.*, 42 B.R. 419 (Bankr. D. Alaska 1984)
3. *In re Shaffer-Gordon Assocs., Inc.*, 68 B.R. 344 (Bankr. E.D. Pa. 1986)
4. *In re Great Sweats, Inc.*, 113 B.R. 240 (Bankr. E.D. Va. 1990)
5. *In re Courson*, 138 B.R. 928 (Bankr. N.D. Iowa 1992)
6. *In re DN Assocs.*, 165 B.R. 344 (Bankr. D. Me. 1994)
7. *In re Computer Learning Ctrs., Inc.*, 285 B.R. 191 (Bankr. E.D. Va. 2002)
8. *In re Wireless Telecomms. Inc.*, 449 B.R. 228 (Bankr. M.D. Pa. 2011)

C. Cases denying fee-defense compensation because court believed it lacked discretion

1. *In re Wilson Foods Corp.*, 36 B.R. 317 (Bankr. W.D. Okla. 1984)*
2. *In re The Vogue*, 92 B.R. 717 (Bankr. E.D. Mich. 1988)*
3. *In re McClanahan*, 137 B.R. 73 (Bankr. M.D. Fla. 1992)
4. *In re St. Rita's Assoc. Private Placement, L.P.*, 260 B.R. 650 (Bankr. W.D.N.Y. 2001)

5. *In re New Boston Coke Corp.*, 299 B.R. 432 (Bankr. E.D. Mich. 2003)*

6. *In re Teraforce Tech. Corp.*, 347 B.R. 838 (Bankr. N.D. Tex. 2006)

7. *In re Brous*, 370 B.R. 563 (Bankr. S.D.N.Y. 2007)*

8. *Frazin* v. *Haynes & Boone LLP (In re Frazin)*, 413 B.R. 378 (Bankr. N.D. Tex. 2009)

9. *In re JNS Aviation LLC*, No. 04–21055, 2009 WL 80202 (Bankr. N.D. Tex. Jan. 9, 2009)

D. Cases denying compensation both for preparing and defending fee applications

1. *In re Gibbons-Grable Co.*, 151 B.R. 814 (Bankr. N.D. Ohio 1992)

2. *In re Jefsaba, Inc.*, 172 B.R. 786 (Bankr. E.D. Pa. 1994)

3. *In re Rothman*, 206 B.R. 99 (Bankr. E.D. Pa. 1997)

4. *In re Euromotorsport Racing, Inc.*, 94-04503-RLB-11, 2000 WL 33963797 (Bankr. S.D. Ind. June 13, 2000)

* Cases where the same court allowed compensation for defending a fee application in a subsequent case.

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AUG 15 2014

No. 14-103

In The
Supreme Court of the United States

BAKER BOTTS L.L.P. AND JORDAN, HYDEN, WOMBLE, CULBRETH & HOLZER, P.C.,
Petitioners,

v.

ASARCO LLC,
Respondent.

On Petition for a Writ of Certiorari to The United States Court of Appeals For The Fifth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The court of appeals held that § 330 of the Bankruptcy Code does not provide the required explicit statutory authority to award fees for litigating (as opposed to preparing) a fee application, though it made clear that parties can recover fees under a settled exception to the American Rule where there is bad faith or vexatious conduct by an opposing party. No such conduct was alleged or found here.

The question presented is whether, when there is no finding of bad faith or vexatious conduct, a party seeking attorneys' fees for litigating a fee application can obtain recovery under § 330.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

BRIEF FOR RESPONDENT IN OPPOSITION 1

OPINIONS BELOW 1

JURISDICTION 1

PRELIMINARY STATEMENT 1

STATEMENT 2

A. Proceedings In The Bankruptcy Court 2

B. Proceedings In The District Court And On Remand 4

C. Proceedings In The Court Of Appeals 5

REASONS FOR DENYING THE PETITION 8

I. There Is No Material Split Between The Fifth And Ninth Circuits. 9

II. More Percolation On The Issue Is Merited. 14

III. There Is No Important Question Of Federal Law Presented. 16

IV The Court Of Appeals Correctly Decided The Case. 18

A. The American Rule Governs Fee Awards. 19

B. No Exception To The American Rule Applies Here. 19

TABLE OF CONTENTS
(continued)

Page

C. Policy Arguments Do Not Support Awarding Fees. 24

V. The Issue Should Be Left To Congress. 25

CONCLUSION....26

TABLE OF AUTHORITIES

Page(s)

CASES

Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,
421 U.S. 240 (1975).....19, 20, 24, 25, 26

Boyd v. Engman,
404 B.R. 467 (W.D. Mich. 2009) 21

*Buckhannon Bd. & Care Home, Inc. v.
W. Va. Dept. of Health & Human Res.*,
532 U.S. 598 (2001).....19

Chambers v. NASCO, Inc.,
501 U.S. 32 (1991).....9, 11, 15

Corley v. United States,
556 U.S. 303 (2009).....21

Frazin v. Haynes & Boone, LLP (In re Frazin),
413 B.R. 378 (Bankr. N.D. Tex. 2009) 12

Grant v. George Schumann Tire & Battery Co.,
908 F.2d 874 (11th Cir. 1990).....14, 15

Hardt v. Reliance Standard Life Ins. Co.,
560 U.S. 242 (2010).....19

In re ACT Mfg., Inc.,
281 B.R. 468 (Bankr. D. Mass. 2002).....11

In re Consolidated Bancshares, Inc.,
785 F.2d 1249 (5th Cir. 1986).....8

In re Fibermark, Inc.,
349 B.R. 385 (Bankr. D. Vt. 2006).....11

TABLE OF AUTHORITIES
(continued)

Page(s)

In re Riverside-Linden Inv. Co.,
945 F.2d 320 (9th Cir. 1991).....10, 12, 13

In re Smith,
317 F.3d 918 (9th Cir. 2002).....*passim*

In re St. Rita's Assocs. Private Placement, L.P.,
260 B.R. 650 (Bankr. W.D.N.Y. 2001).....13, 22

In re Teraforce Tech. Corp.,
347 B.R. 838 (Bankr. N.D. Tex. 2006) 7, 13

In re Wind N' Wave,
509 F.3d 938 (9th Cir. 2007).....17

In re Wireless Telecomms. Inc.,
449 B.R. 228 (Bankr. M.D. Pa. 2011).....22

Key Tronic Corp. v. U.S.,
511 U.S. 809 (1994).....20, 23

Lamie v. United States Trustee,
540 U.S. 526 (2004).....15, 16

Longhorn Partners Pipelines L.P. v. KM Liquids Terminals, L.L.C.,
408 B.R. 90 (Bankr. S.D. Tex. 2009) 15

Monessen Sw. Ry. Co. v. Morgan,
486 U.S. 330 (1988).....22

Ngiraingas v. Sanchez,
495 U.S. 182 (1990).....22

TABLE OF AUTHORITIES
(continued)

Page(s)

Rice v. Sioux City Mem'l Park Cemetary, 349 U.S. 70 (1955) 18

STATUTES

11 U.S.C. § 327 16

11 U.S.C. § 330 ..... *passim*

11 U.S.C. § 330(a) 5, 21

11 U.S.C. § 330(a)(1) 10

11 U.S.C. § 330(a)(3)(A) 21

11 U.S.C. § 330(a)(3)(B) 21

11 U.S.C. § 330(a)(3)(C) 6

11 U.S.C. § 330(a)(3)(D) 21

11 U.S.C. § 330(a)(3)(E) 21

11 U.S.C. § 330(a)(3)(F) 23

11 U.S.C. § 330(a)(4) 6

11 U.S.C. § 330(a)(4)(A) 10

11 U.S.C. § 330(a)(6) 4, 6, 13, 20, 21, 22

11 U.S.C. § 503(b)(4) 17

28 U.S.C. § 1254(1) 1

TABLE OF AUTHORITIES
(continued)

Page(s)

RULES

Sup. Ct. R. 10 18

Sup. Ct. R. 10(a) 13

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent ASARCO LLC respectfully requests that the Court deny the petition for a writ of certiorari filed in this case.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fifth Circuit is reported at 751 F.3d 291. The district court's opinion is reported at 477 B.R. 661. The bankruptcy court's opinion is unreported, but it is available at 2011 WL 2974957.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 2014. The petition for writ of certiorari was filed on July 29, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PRELIMINARY STATEMENT

Petitioners seek this Court's review by alleging that the court of appeals has created a circuit conflict on an important question of federal bankruptcy law. In reality, petitioners seek review because after receiving more than $120 million in attorneys' fees for their bankruptcy work—plus receiving an additional award of $4 million in fee enhancements—they want *$5 million* more because they chose to have 191 timekeepers, including 150 attorneys, work on litigating their fee applications. Yet there is no allegation or finding in this case that ASARCO's objections to petitioners' fee requests were made in bad faith. On such facts, no court of appeals has held that fees for litigating a fee application are recoverable. As explained below, there is no meaningful conflict on the issue

presented here because both the Fifth and Ninth Circuits allow recovery of fees for frivolous or bad faith objections, whether under § 330 or a settled exception to the American Rule. Nor is this issue sufficiently developed or significant enough to merit this Court's review at this time. The Court should deny review.

STATEMENT

Petitioners served as debtors' counsel to ASARCO LLC. They collectively were paid over $120 million in lodestar fees and have been awarded over $4 million more in fee enhancements. Pet. App. 3a-4a, 21a. This dispute involves petitioners' attempt to receive over $5 million more in fees for litigating their fee requests. *Id.* at 4a, 21a.

A. Proceedings In The Bankruptcy Court

Following the effective date of ASARCO's plan of reorganization, petitioners filed final fee applications with the bankruptcy court seeking (i) over $120 million in lodestar fees for work done as debtors' counsel, (ii) over $24 million in fee enhancements, (iii) expense reimbursements, and (iv) over $8 million in fees for litigating both the fee applications and the requested fee enhancement. *Id.* at 56a; C.A. Rec. 7051.

In response, ASARCO maintained that certain of the lodestar fees were excessive and in violation of local bankruptcy rules because, among other things, many time descriptions were vague, much of the fees included non-compensable clerical or administrative tasks, and numerous time entries were lumped or block-billed. C.A. Rec. 6058-68. ASARCO also initially objected to a portion of petitioners' expenses,

although the parties later resolved those issues by agreement. Pet. App. 58a.

ASARCO also objected to the request for fee enhancements, noting that petitioners had been adequately compensated at their full hourly rates that they had set—and increased throughout the bankruptcy—and that these lodestar fees were paid without delay during the bankruptcy. Sealed C.A. Rec. 589-607, 623-61.

ASARCO further objected to the request for fees for litigating either the fee application or the requested fee enhancement. C.A. Rec. 6883-6902. Citing the statute and numerous opinions, ASARCO maintained that § 330 of the Bankruptcy Code does not permit recovery of fees for litigating a fee application or a fee enhancement. *Id.* at 6887-93, 6900-02. ASARCO also argued that Baker Botts' request for over $8 million in fees for the five-month litigation over fees—including billing from over 191 Baker Botts timekeepers (150 attorneys)—was excessive. *Id.* at 6893-6900.

Petitioners' assertion that "*every single objection* was overruled," Pet. 5, is inaccurate. After ASARCO filed its objections, Baker Botts agreed to reduce its fee request by $112,927 and its expense reimbursement request by $19,463.52. Pet. App. 145a, Sealed C.A. Rec. 2018-21. The bankruptcy court also reduced the requested fee enhancement by approximately $20 million. Pet. App. 133a-135a. Petitioners assert that "[n]o party disputed the amount of defense fees." Pet. 25. The truth is that ASARCO did dispute the amount of fees, and the bankruptcy court found that the fees sought for

litigating the fee request were "higher than were reasonable and necessary." Pet. App. 142a.

The bankruptcy court nevertheless awarded Baker Botts $5 million (reduced from the requested $8 million) for litigating both the fee application and the fee enhancement request. *Ibid.* It concluded that § 330(a)(6), which addresses fees for preparing a fee application, also permitted recovery of fees for defending a fee application and pursuing a fee enhancement. *Id.* at 135a, 140a-141a. Citing policy considerations such as dilution of fees, the bankruptcy court rejected the cases denying recovery of fees for litigating fee applications and fee enhancements. *Id.* at 136a-141a.

Notably, although the bankruptcy court overruled ASARCO's objections to the lodestar fees that petitioners sought after agreed-upon reductions, petitioners never contended, and the bankruptcy court made no finding, that ASARCO's objections were frivolous or made in bad faith. *Id.* at 21a, 55a-151a.

B. Proceedings In The District Court And On Remand

Adopting the reasoning of the bankruptcy court, the district court concluded that fees for defending the lodestar fees were recoverable. *Id.* at 45a-47a. It reversed, however, the bankruptcy court's determination that Baker Botts could recover fees for its pursuit of a fee enhancement. *Id.* at 48a-49a. Rejecting Baker Botts' request for fees incurred while pursuing additional fees (enhancements on top of the lodestar fees paid at rates that Baker Botts set), the district court found that such fees were not compensable because they did not benefit the estate.

Id. at 48a. As a "further reason" for its decision, the district court also rejected the argument that pursuing a fee enhancement was necessary to the administration of the estate. *Id.* at 48a-49a.

Because the bankruptcy court had awarded $5 million in fees for litigation of *both* the lodestar fees and the fee enhancement, the district court remanded to the bankruptcy court for a determination of the amount of fees recoverable solely for litigation of the lodestar fees. *Id.* at 54a. On remand, despite having initially awarded $5 million for both tasks, and despite having cut Baker Botts' initial "fees for defense of fees" request by over 37% for being higher than was reasonable, the bankruptcy court concluded that *all* of the $5 million fee previously awarded was for litigation of the lodestar fees, and that none was awarded for pursuit of the fee enhancement. *Id.* at 147a-151a.[1]

C. Proceedings In The Court Of Appeals

While the Fifth Circuit affirmed the ruling allowing petitioners to recover over $4 million in fee enhancements, it reversed the award of fees for litigating the lodestar fees. *Id.* at 21a. It carefully analyzed the statutory text, concluding that "[s]ection 330(a) does not authorize compensation for

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[1] ASARCO elected not to appeal the determination of the *amount* of fees for litigating the fee application, in part due to the discretion afforded such decisions on appeal. While it is therefore accurate to note that ASARCO did not appeal that determination, it is a distortion to claim that it is "undisputed" that "petitioners reasonably spent over $5 million solely to defend their fee applications," Pet. 5, or that "[n]o party disputed the amount of defense fees." *Id.* at 25.

the costs counsel or professionals bear to defend their fee applications." *Id.* at 14a.

The court specifically rejected the bankruptcy court's and the district court's reliance on § 330(a)(6) as authority for fees defending a fee application: "[T]he specification of an award for 'preparation of a fee application' is clearly different from authorizing fees for the defense of the application in a court hearing." *Id.* at 15a (quoting § 330(a)(6)). The court further reasoned that interpreting § 330(a)(3)(C) as authorizing compensation for professional fee applications would render § 330(a)(6) superfluous. *Id.* at 16a.[2]

Finding an "absence of explicit statutory guidance" for awarding fees for defending a fee application, the court applied the "American Rule that each party to litigation bears its own costs." *Id.* at 17a. Further, the court noted that "the exception to the American Rule that allows fee shifting where an adverse party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons" is available, yet was not raised in this case. *Id.* at 21a.

The Fifth Circuit rejected petitioners' attempt to justify their requests for fees on other language in § 330 or on policy rationales. Section 330 prohibits compensation for "services that were not reasonably likely to benefit the debtor's estate *or* necessary to case administration." *Id.* at 14a (citing § 330(a)(3)(C), (4)). Because the fee applicant is the primary beneficiary of a fee application, and because

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[2] It appears that this portion of the Fifth Circuit's opinion contains a typographical error, referencing § 330(a)(4) rather than § 330(a)(6).

the debtor's estate bears the cost of litigating fee applications, the court concluded that the "straightforward reading" of these provisions supports the conclusion that fees for defense of a fee application are not compensable. *Id.* at 15a. The court also found that analogizing to federal fee shifting statutes was unwarranted because "Congress designed fee shifting provisions in express derogation of the American Rule," with the intent that "the losing party should bear the full costs of counsel for the winner." *Id.* at 17a. The court concluded that there is no such "explicit statutory guidance" in § 330 and "the equities are quite different in bankruptcy." *Ibid.*

Further, the Fifth Circuit found "difficult to analyze"—because it requires judgments "in the eye of the beholder"—petitioners' claim that not awarding fees for litigating the fee application would unfairly dilute fees below that of non-bankruptcy lawyers. *Id.* at 18a-19a. Beyond the comparability achieved by applying reasonably comparable rates and adjusting compensation in light of specific circumstances, the court found that "[m]ore cannot easily be demanded" from the statute's language. *Id.* at 18a. The court also credited the opinion of an "astute bankruptcy court" that the comparability principle actually supports the denial of fees because the American Rule applies outside of bankruptcy to deny fees unless an exception is established. *Id.* at 19a (citing *In re Teraforce Tech. Corp.*, 347 B.R. 838, 867 (Bankr. N.D. Tex. 2006) (Houser, J.)). Although § 330 statutorily authorizes recovery of certain fees, the court held that "[s]ection 330 is not fairly read to include 'fees for defense of fees.'" *Id.* at 19a-20a.

Finally, the Fifth Circuit emphasized that its "opinion should not be read as encouraging tactical or ill-supported objections to fee applications." *Id.* at 20a-21a. The court first noted that the concern may be overstated, recounting its prior observation that too frequently bankruptcy professionals, "sharing the mutual goal of securing approval for their fees, enter into a conspiracy of silence with regard to contesting each other's fee applications." *Id.* at 20a (quoting *In re Consolidated Bancshares, Inc.*, 785 F.2d 1249, 1255 (5th Cir. 1986)). But where objections are asserted, the court expressed confidence that bankruptcy courts, "practicing vigilance and sound case management, can thwart punitive or excessively costly attacks on professional fee applications." *Id.* at 21a. The court stated that, where appropriate, courts "should not hesitate to implement" the bad faith exception to the American Rule. *Ibid.* The court noted that ASARCO was not alleged or found to have engaged in any bad faith conduct. *Ibid.*

REASONS FOR DENYING THE PETITION

Contrary to petitioners' arguments, there is no meaningful conflict between the Fifth Circuit's decision and the Ninth Circuit's opinion in *In re Smith*, 317 F.3d 918 (9th Cir. 2002). Even if the opinions were in conflict, it would at best constitute a nascent split—with the two decisions coming more than a decade apart—that would merit further percolation among the courts of appeals. Moreover, the issue in dispute is not sufficiently important to merit review, as evidenced by the dearth of courts of appeals rulings (and even the relative lack of lower-court opinions) on the issue over the past 35 years since the 1978 amendments that adopted the

comparability factor. Finally, the Fifth Circuit was correct in determining that § 330 contains no explicit statutory authorization for fees for litigating a fee application, and any decision whether to permit such fees should be left to Congress. The Court should deny review.

I. There Is No Material Split Between The Fifth And Ninth Circuits.

Petitioners' claim that the Fifth and Ninth Circuits have "squarely divided" ignores the materially different facts that each court confronted. The Ninth Circuit decided a case in which the bankruptcy court expressly found the opposing party's objections to be "frivolous," and thus that court made no holding about whether fees could be awarded under § 330 in the absence of such a circumstance. *In re Smith*, 317 F.3d at 929. By contrast, the Fifth Circuit noted there was no issue raised in this case of bad faith or vexatious objections, and it made clear that fees could be awarded in the case of bad faith or vexatious conduct under *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991). Pet. App. 21a. Thus, while the courts may have differed in their interpretation of § 330, it cannot be said that the opinions created a conflict that matters because they addressed materially different facts—one in which the objections were found to be frivolous, and one in which the objections were not. And both cases recognized that fees could be awarded (albeit under different sources) where the opposing party acts in bad faith or vexatiously.

For this reason, in arguing that "the split could not be starker," petitioners are wrong to assert that "[d]efense fees are never available in the Fifth

Circuit as a matter of law." Pet. 19. In fact, the Fifth Circuit confirmed that bankruptcy courts can and should, where appropriate, implement the bad faith exception to the American Rule that allows fee shifting for bad faith or vexatious conduct—precisely the conduct at issue in *Smith*, though not here. Pet. App. 20a-21a. There is no material conflict.

The finding in *Smith* that the objections were "frivolous" is not a simple factual distinction without a difference; it was a basis for the Ninth Circuit's award of fees. In deciding whether to award fees, the Ninth Circuit concluded the applicant must demonstrate two things: (1) "the services for which compensation is sought satisfy the requirements of section 330(a)(4)(A)" and (2) the "case exemplifies a 'set of circumstances' where the time and expense incurred by the litigation is 'necessary' within the meaning of section 330(a)(1)." *In re Smith*, 317 F.3d at 928. In concluding that fees were warranted under the second element of this test, the Ninth Circuit relied upon the bankruptcy court's conclusion that the objections were frivolous. *Id.* at 929. Moreover, in an earlier case that did not involve frivolous objections, but instead had most objections sustained, the Ninth Circuit affirmed the bankruptcy court's denial of litigation fees. *See In re Riverside-Linden Inv. Co.*, 945 F.2d 320, 322-23 (9th Cir. 1991).

Accordingly, while petitioners describe "the only issue in both cases" as "whether courts may assess defense fees at all," the Fifth and Ninth Circuits reached the same conclusion on that question: yes, depending upon the circumstances. While the courts read § 330 differently, there is no reason to believe that the Fifth Circuit would have reached a different

outcome in *In re Smith*, as it encouraged awards of defense fees when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. Pet. App. 21a. Although it would rely on *Chambers* to award fees, there is simply no reason to doubt that the Fifth Circuit would have affirmed the bankruptcy court's decision in *Smith* to award fees for responding to "frivolous" objections that were "extraordinarily wasteful of the resources available in bankruptcy." *In re Smith*, 317 F.3d at 921-22.

Further, the Fifth Circuit's observation that this case did not merit application of the bad faith exception to the American Rule is well-grounded in both the procedural history of the case and the substantive law. In spite of petitioners' protests about the lack of merit in ASARCO's objections, they do not assert—and have never asserted—that ASARCO's objections constituted bad faith conduct under *Chambers*. Pet. App. 21a. This was no mere oversight by petitioners; as a matter of substantive law, no credible claim could have been made that ASARCO's objections supported the bad faith exception. ASARCO's objections were similar, and often identical, to objections that other bankruptcy courts have accepted. *See, e.g.*, *In re Fibermark, Inc.*, 349 B.R. 385, 396-97, 402, 406 (Bankr. D. Vt. 2006) (disallowing fees for vague or lumped time descriptions and clerical tasks); *In re ACT Mfg., Inc.*, 281 B.R. 468, 485 (Bankr. D. Mass. 2002) (same). The fact that the bankruptcy court ultimately overruled ASARCO's objections, despite similar issues with Baker Botts' billing and despite the requirements of the local bankruptcy rules, does not undermine the fact that ASARCO made its

objections in good faith.[3] Additionally, ASARCO's decision not to pursue these objections on appeal does not demonstrate that the objections were insincere; to the contrary, it demonstrates a good faith decision by ASARCO to focus its appellate arguments and to not pursue such challenges when appellate deference to the bankruptcy court's decisions would have made prevailing difficult.

Just as there is no reason to believe the Fifth Circuit would have reached a different ultimate outcome in deciding *In re Smith*, there is no reason to presume the Ninth Circuit would have resolved this case differently. As noted above, the Ninth Circuit has denied fees when the objections were not frivolous. *See In re Riverside-Linden*, 945 F.2d at 322-23. And while the objecting party in *In re Riverside-Linden* may have enjoyed a greater degree of success than ASARCO, it remains true that ASARCO's objections resulted in a meaningful reduction of the fees that petitioners were seeking. Pet. App. 145a.

An "astute bankruptcy court" (as the Fifth Circuit put it in citing that court with approval) used this very basis to harmonize the Ninth Circuit's opinions with its application of the American Rule:

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[3] *See, e.g., Frazin v. Haynes & Boone, LLP (In re Frazin)*, 413 B.R. 378, 403 (Bankr. N.D. Tex. 2009) ("[D]efeat on the merits does not, by itself, justify an award of attorney's fees under the bad faith exception. . Attorneys' fees will not be awarded even where a claim lacks merit, if there is no evidence of bad faith, improper motive, or reckless disregard of the duty owed to the court." (internal quotation marks and citation omitted)), *aff'd in part and rev'd in part on other grounds*, 732 F.3d 313 (5th Cir. 2014).

> *In re St. Rita's Assocs. Private Placement, L.P.*, 260 B.R. 650 (Bankr. W.D.N.Y. 2001) held that while debtor's counsel was entitled to be compensated for the preparation of its fee application pursuant to section 330(a)(6), it was not entitled to compensation for defending its fee application against objections thereto, especially since the objections were filed in good faith and ultimately resulted in a partial disallowance of the requested fees. 260 B.R. at 652. The *St. Rita's* court reasoned that such a rule comported with the "American rule" of recovery, applicable to fee disputes occurring outside the realm of bankruptcy. The court did not go so far as to preclude any recovery of attorney fees incurred in defending a fee application—in fact, it left open the door to recovery of such fees where sanctions are appropriate for the filing of inappropriate objections. A careful reading of *Riverside-Linden* and *Smith* cases, cited above for differing propositions, supports the *St. Rita's* compromising analysis.

In re Teraforce, 347 B.R. at 866-67 (Houser, J.). There is no material split between the Fifth and Ninth Circuits.

Petitioners also claim that review is warranted based on a division among lower courts, Pet. 21-22, but this Court ordinarily considers only important splits among the courts of appeals. Sup. Ct. R. 10(a).

Petitioners offer no basis for departing from that practice in this case. Furthermore, review is not warranted because there is no widespread division among the courts on any important issue. To the contrary, as explained below, so few cases have addressed the issue, even at the lower court levels, that it is clear the issue is not an important one meriting this Court's review. *See* Part III, *infra*.

II. More Percolation On The Issue Is Merited.

If there were a material conflict between the Fifth and Ninth Circuits, it would constitute a nascent split of just two courts of appeals on the issue. Particularly because these opinions have come more than a decade apart, with no apparent development of the issue by other courts of appeals, the Court should await further development before undertaking review. Even adding the Eleventh Circuit, by virtue of its decision denying fees in *Grant v. George Schumann Tire & Battery Co.*, 908 F.2d 874 (11th Cir. 1990), would not diminish the need for more percolation of this issue in the circuit courts.

Petitioners have attempted to bolster the importance of the few decisions on this issue with data regarding the number of bankruptcy filings in the Fifth, Ninth, and Eleventh Circuits. Pet. 25 & n.11. But the fact remains that over 60% of the bankruptcy filings from last year were in circuits that have not addressed this issue. The Sixth and Seventh Circuits, two of the top four circuits by number of bankruptcy filings made in 2013, are among the courts of appeals that have not addressed this issue. Additionally, the Second and Third Circuits, notable because they encompass two

districts (the Southern District of New York and the District of Delaware) where many of the largest bankruptcies are filed, also have not had occasion to address the issue.[4] Moreover, petitioners claim that the Eleventh Circuit's decision in *Grant* should be disregarded as factually distinguishable and pre-dating the 1994 amendments. *Id.* at 19-20. If the Court credits this view, it adds another court of appeals that has not meaningfully addressed the issue.

Even in the circuits that have addressed the issue, more percolation would clarify the extent to which any conflict exists. As discussed above, there is no material conflict between the Fifth and Ninth Circuits, as the Fifth Circuit would not refuse to award fees (albeit under *Chambers*) where the objections were frivolous, and the Ninth Circuit has not awarded fees under § 330 where such an allegation or finding is lacking. Further, the Ninth Circuit could choose to revisit its decade-old *Smith* decision in light of the Fifth Circuit's decision and this Court's decision in *Lamie v. United States Trustee*, 540 U.S. 526 (2004), which abrogated part of the ruling in *In re Smith*.[5] The Court could benefit

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[4] *See Longhorn Partners Pipelines L.P. v. KM Liquids Terminals, L.L.C.*, 408 B.R. 90, 102 (Bankr. S.D. Tex. 2009) ("The national trend is for major corporations to file bankruptcy petitions in New York or Delaware rather than the debtor's principal place of business."). There is good reason to consider where the largest bankruptcies are filed, because these bankruptcies present the most likely scenario in which parties could have a dispute of sufficient size to merit litigating fees for fees.

[5] The decision in *Lamie* is germane to this dispute. Under *Lamie*, § 330 does not permit compensation to debtors' counsel for time spent other than in representation of a trustee

from additional development of the issue in the courts of appeals that have addressed the issue and the many others that have not.

III. There Is No Important Question Of Federal Law Presented.

Petitioners argue that the issue presented is one of great importance, claiming that "[t]his issue recurs repeatedly in bankruptcy courts nationwide" and that "[t]he defense of fees is thus a potential issue in *every* bankruptcy case involving estate-paid professionals." Pet. 5, 23. Petitioners even represent that "[t]he Fifth Circuit's decision affects the entire bankruptcy system." *Id.* at 24.

These statements are wildly exaggerated on their face and cannot be squared with reality. Indeed, the virtual absence of decisions on the issue convincingly demonstrates that the issue is not significant. Despite the theoretical possibility of this issue arising in "every bankruptcy case," only *three* courts of appeals have apparently addressed the issue in over *35 years* since the 1978 amendments to the Bankruptcy Code. Only two courts of appeals have addressed the issue in the 20 years since the 1994 amendments, and those opinions were

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or debtor-in-possession under § 327. *See Lamie*, 540 U.S. at 534 ("A debtor's attorney not engaged as provided by § 327 is simply not included within the class of persons eligible for compensation. Unless the applicant for compensation is in one of the named classes of persons in the first part, the kind of service rendered is irrelevant."). The fees petitioners seek were not incurred during employment as counsel for the debtor-in-possession under § 327; they were incurred after the effective date of the plan of reorganization and after the debtor-in-possession ceased to exist. Pet. 8.

separated by 12 years.[6] Even as to the lower courts, petitioners cite a total of only 57 reported cases over a 32-year period. Pet. App. 167a-171a. This represents an infinitesimally small percentage of the bankruptcy cases filed during that timeframe.[7] Petitioners cannot explain how an issue that arises in roughly two published lower court cases for every million bankruptcy cases filed—leading to one court of appeals opinion on the subject every 12 years—is significant enough to merit this Court's attention. Certainly, petitioners' claim of harm to "the entire bankruptcy system" cannot be taken seriously.

Moreover, petitioners acknowledge, as they must, that two courts of appeals and several lower courts have *denied* fees for litigating a fee application. Pet. 21; Pet. App. 167a-171a. There is no indication that these decisions are threatening the sound functioning of the bankruptcy system or deterring lawyers from practicing bankruptcy law.

To merit this Court's review, the question should extend "beyond the academic or the episodic."

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[6] Petitioners discuss *In re Wind N' Wave*, 509 F.3d 938 (9th Cir. 2007) as if it were another Ninth Circuit case determining fee issues under § 330, but the statute at issue in that case was 11 U.S.C. § 503(b)(4). *Id.* at 941 ("This appeal presents an issue of first impression and turns on the interpretation of Bankruptcy Code Section 503(b)(4).").

[7] According to annual statistics from the Administrative Office of the U.S. Courts, over one million bankruptcy filings were made in 2013 alone. For the years 1990-2013 (the data available on the website for the Administrative Office of the U.S. Courts), the average number of annual bankruptcy filings was over 1.2 million per year. Using only the total number of filings since 1990, and leaving off all filings during the eight years from 1982-1989, yields a percentage of reported cases involving "fees for defense of fees" of less than 0.0002%.

See Rice v. Sioux City Mem'l Park Cemetary, 349 U.S. 70, 73-74 (1955) (applying an earlier version of this Court's rules). This case involves an issue that arises only episodically, and it arises here only because of Baker Botts' 191-timekeeper, 150-lawyer effort that somehow was felt needed to defend prior work and that led to an alleged $5 million in collateral fees.[8] This Court does not "sit for the benefit of the particular litigants." *Id.* at 74 (citation omitted). This case does not involve an important question of federal law that warrants this Court's review. Sup. Ct. R. 10.

IV. The Court Of Appeals Correctly Decided The Case.

Even if there were a conflict worthy of this Court's attention, the Court should deny review here because the court of appeals resolved the issue correctly. Notwithstanding all of their arguments,

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[8] The notion that ASARCO forced Baker Botts to incur this amount of fees is unsupportable. Baker Botts itself decided to conduct a "self-audit" of its invoices—when those invoices should have been prepared correctly on a contemporaneous basis—and that self-audit revealed enough issues for Baker Botts to generate a massive "1160-page supplement" to the original invoices. Pet. 8. Additionally, while Baker Botts complains about the time it spent responding to what it inaccurately characterizes as an onerous discovery request, ASARCO actually requested the file it owned by virtue of paying over $100 million in fees to Baker Botts. Baker Botts *sua sponte* spent 2,440 hours reviewing that file, all purportedly in an attempt "to avoid revealing privileged information" when it was ASARCO, as the client, that owned the file and the privilege. *Id.* at 8-9. Further, to the extent Baker Botts intermingled other clients' privileged information in ASARCO's file, ASARCO was not at all responsible for the cost of the effort to segregate that information.

petitioners have not pointed to anything in the statute that clearly departs from the American Rule to authorize fees for litigating fees. Petitioners' attacks on the Fifth Circuit's opinion give too little consideration to the statutory text and far too much weight to asserted policy considerations. In doing so, petitioners invite the Court to assume "roving authority" to award fees on policy grounds in the absence of statutory authorization, an invitation this Court has refused in other cases. *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Res.*, 532 U.S. 598, 609 (2001). The court of appeals correctly applied the American Rule to deny petitioners' fees for litigating their fee applications because Congress has not explicitly allowed the recovery of these fees.

A. The American Rule Governs Fee Awards.

The American Rule, by which each litigant pays its own attorneys' fees subject to certain limited exceptions, is this Court's "basic point of reference when considering the award of attorney's fees." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252-53 (2010) (internal quotation marks and citations omitted). The American Rule is a "bedrock principle" that is "deeply rooted in our history and in congressional policy." *Id.* at 253; *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 271 (1975).

B. No Exception To The American Rule Applies Here.

This Court has recognized four exceptions to the American Rule: (1) a contract between the parties allowing recovery of fees, (2) a specific statute,

(3) the common fund theory, and (4) cases involving willful disobedience of a court order or instances of bad faith, vexatious, wanton or oppressive conduct. *See Alyeska*, 421 U.S. at 257-59. The only basis alleged here is that § 330 makes an exception to the American Rule. To avoid the American Rule on this basis, the Court requires "explicit statutory authority." *Key Tronic Corp. v. U.S.*, 511 U.S. 809, 819 (1994).

Section 330(a)(6) expressly authorizes recovery of fees incurred in preparing a fee application, but § 330 contains no provision that explicitly allows recovery of fees for litigating a fee application. That is the "straightforward reading" of the statute credited by the court of appeals. Pet. App. 15a. Petitioners' challenges to this analysis of the statute lack merit.

Petitioners claim that § 330(a)(6) is not a "textual grant" of authority for fees, but rather only "provides a metric for setting fee-preparation compensation." Pet. 29. Petitioners claim that fees for preparing a fee application and fees for litigating a fee application are instead authorized by other portions of the statute granting broad authority to compensate estate professionals. *Id.* at 27, 29.

Petitioners' argument that § 330(a)(6) is not a textual grant of authorization is contrary to their initial position—which they persuaded the bankruptcy court to adopt without changing a word—that "section 330(a)(6) authorizes a bankruptcy court to award a professional fees and expenses for defending a fee application if the professional is successful." Pet. App. 135a. Petitioners' new position also is contrary to the plain

language of the statute, as acknowledged even in those opinions upon which petitioners most heavily rely. *See, e.g.*, *In re Smith*, 317 F.3d at 928 ("While section 330(a) expressly contemplates compensation for fee preparation, it does not mention compensation for other services associated with the preparation of fee applications, such as litigation in defense of fee applications."); *Boyd v. Engman*, 404 B.R. 467, 482 (W.D. Mich. 2009) ("The Bankruptcy Code expressly states that attorneys may recover fees for the 'preparation of a fee application.' The code does not directly address whether attorneys may also be compensated for fees incurred in responding to objections to a fee application." (citations omitted)).

Petitioners' assertion that the sole purpose of § 330(a)(6) was to provide the standard for how much to compensate for preparing a fee application also is misguided. If fees for preparing a fee application were already authorized under a broad grant of authority, there would be no need to specify that the fees must be based on the level and skill reasonably required to prepare the application, as these criteria are articulated in earlier parts of § 330. 11 U.S.C. § 330(a)(3)(A), (B), (D), and (E). Petitioners' interpretation therefore renders § 330(a)(6) superfluous, and the Fifth Circuit rightly rejected this interpretation. Pet. App. 16a; *see Corley v. United States*, 556 U.S. 303, 314 (2009) (noting that avoiding surplusage is "one of the most basic interpretative canons").

Congress' provision for fees in preparing the fee application, while omitting any similar provision for litigating the fee application, was not mere happenstance that can be ignored. Prior to the 1994

amendments that added the provision for preparation of the fee application, courts had reached differing conclusions on whether fees for the preparation and defense of the fee application were recoverable. *See In re St. Rita's Assocs. Private Placement, L.P.*, 260 B.R. 650, 651 (Bankr. W.D.N.Y. 2001). In testimony before Congress, the American Bankruptcy Institute urged Congress to make both "expressly compensable." *In re Wireless Telecomms. Inc.*, 449 B.R. 228, 236 (Bankr. M.D. Pa. 2011). Congress did not do so: "This was obviously a position partially rejected by Congress which provided for compensation for the preparation of the application, but not the prosecution of such." *Id.* (citation omitted). In expressly stating only that fees for the preparation of the fee application were recoverable, Congress implicitly foreclosed recoverability of fees for litigating the fee application on the basis of a statutory exception. *Cf. Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 336 (1988) ("We can discern a sufficiently clear indication of legislative intent with regard to prejudgment interest under the FELA, however, when we consider Congress' silence on this matter in the appropriate historical context."); *see also Ngiraingas v. Sanchez*, 495 U.S. 182, 188-89 (1990) (concluding that congressional "silence on [a] matter is itself a significant indication of the legislative intent" (internal quotation marks and citation omitted)). Congress' silence here is particularly meaningful in light of the American Rule. The Fifth Circuit correctly held that § 330(a)(6) supports the conclusion that § 330 does not permit fees for litigating the fee application. Pet. App. 15a-16a.

In reaching its conclusion, the Fifth Circuit properly acknowledged the distinction between the services that professionals render during a bankruptcy case to benefit and administer the estate—compensation for which is expressly permitted under the statute—and the fees that professionals incur to litigate their own fee requests—which are not expressly permitted under the statute. *Id.* at 14a-16a. Petitioners try to divine authority for fees for litigating fee requests by cobbling together purported "textual indications of statutory breadth," such as the 1994 amendments relating to fees "necessary to administration of the case" or "beneficial at the time at which the service was rendered toward the completion" of a case, or § 330(a)(3)(F)'s requirement to consider the compensation of non-bankruptcy practitioners. Pet. 26-28, 31-33. But these provisions have meaning and application wholly unrelated to allowing fees for litigating fee requests, and the Fifth Circuit properly ruled that they fall far short of the American Rule's requirement for "explicit statutory authority" for fees. Pet. App. 14a-20a.

Petitioners also argue that "fees for defense of fees" should be recoverable because Congress did not expressly enact a "categorical ban" of these fees. Pet. 27, 34. This argument turns the American Rule on its head. The rule, as it pertains to the statutory exception, is that litigation fees are not recoverable unless Congress explicitly authorized them—not that fees are recoverable unless Congress explicitly disallows them. *Key Tronic*, 511 U.S. at 819.

C. Policy Arguments Do Not Support Awarding Fees.

Judicial views regarding what may be fair or good policy do not permit departures from the American Rule. *See Alyeska*, 421 U.S. at 260-61, 263-64, 269-70. To do so would "invade the legislature's province." *Id.* at 271. Yet the courts that have awarded fees for litigating a fee application have done so primarily on the basis of "policy" and "fairness reasons." *See, e.g.*, Pet. App. 140a. Reliance on such judicial policy considerations, even if those considerations are well-founded, is erroneous. It is the exclusive responsibility of Congress to decide whether to make an explicit statutory authorization of fees if it believes doing so is appropriate.

Moreover, petitioners' policy arguments are not well-founded. As the Fifth Circuit noted, comparability with non-bankruptcy lawyers supports the *denial* of fees because non-bankruptcy lawyers face the same American Rule that bankruptcy lawyers do. *Id.* at 19a.[9] Given that non-bankruptcy lawyers operate under the same rules for litigating fee disputes, there is no valid claim that "parity" demands recovering these fees in bankruptcy, nor is there any indication of an exodus of bankruptcy lawyers in the numerous courts that have denied these fees. Notably, despite their heavy reliance on

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[9] Petitioners attempt to analogize to civil-rights fee shifting cases. Pet. 33-34. The Fifth Circuit correctly noted that "Congress designed fee shifting provisions in express derogation of the American Rule" while § 330 contains no "explicit statutory guidance" for the award of fees for litigating a fee application. Pet. App. 17a-18a.

parity arguments, petitioners have never rebutted the fact that the American Rule applies to fee disputes outside of bankruptcy.

The argument that the Fifth Circuit's decision will create "perverse incentives to engage in meritless litigation" also has no basis. Pet. 35-36. As the Fifth Circuit noted, bankruptcy courts have significant ability to thwart such attacks through effective case management. Pet. App. 21a. Further, the American Rule allows fee shifting when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *Ibid.* While petitioners complain that the standards to invoke this exception are too high, these are the standards that prevail in the courts for every case. In sum, there is nothing to petitioners' arguments, even on the merits.

V. The Issue Should Be Left To Congress.

If Congress wished to make fees for litigating a fee application compensable, it had the power to do so by a statute that explicitly makes it so. Petitioners say that Congress has acted to amend the Bankruptcy Code at various times when it felt this was necessary, Pet. 13-15, showing that Congress is able and willing to do so. But none of the prior amendments included a provision that explicitly authorizes "fees for defense of fees." As noted above, the American Rule is deeply rooted in congressional policy. Congress knows the American Rule and the requirement for explicit statutory authority for an award of fees, and this Court interprets statutes with that in mind. *See Alyeska*, 421 U.S. at 269-71.

Whether to award fees for litigating fee applications is a decision that should be left to

Congress. To allow an award of fees without explicit statutory authority would invade the province of Congress. *Id.* at 271.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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v.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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TABLE OF CONTENTS

		Page
I.	There Is A Material Split Between At Least Two Bankruptcy-Heavy Circuits	1
II.	The Issue Is Important And Warrants Immediate Review	6
III.	The Judgment Below Is Wrong	9

TABLE OF AUTHORITIES

Page

CASES

Cent. Bank of Denver v. *First Interstate Bank of Denver*,
511 U.S. 164 (1994) 11

Chambers v. *NASCO, Inc.*,
501 U.S. 32 (1991) 2

Clark v. *Rameker*,
134 S. Ct. 2242 (2014) 6

Comm'r, INS v. *Jean*,
496 U.S. 154 (1990) 9, 11

Hall v. *United States*,
132 S. Ct. 1882 (2012) 6

Hernandez v. *Kalinowski*,
146 F.3d 196 (3d Cir. 1998) 9

In re Nucorp Energy, Inc.,
764 F.2d 655 (9th Cir. 1985) 10

In re Riverside-Linden Inv. Co.,
945 F.2d 320 (9th Cir. 1991) 4

In re Smith,
317 F.3d 918 (9th Cir. 2002) 2, 3, 4, 5

In re Teraforce Tech. Corp.,
347 B.R. 838 (Bankr. N.D. Tex. 2006) 8

In re Wind N' Wave,
509 F.3d 938 (9th Cir. 2007) 4, 9

In re Worldwide Direct Inc.,
334 B.R. 108 (D. Del. 2005) 7

Key Tronic Corp. v. *United States*,
511 U.S. 811 (1994) 10

Lamie v. *U.S. Trustee*,
540 U.S. 526 (2004) 6, 7

TABLE OF AUTHORITIES—Continued

Page

Radlax Gateway Hotel, LLC v. *Amalgamated Bank*, 132 S. Ct. 2065 (2012) 6

Setser v. *United States*, 132 S. Ct. 1463 (2012) 11

CONSTITUTIONAL PROVISION

U.S. Const. art. I, § 8, cl. 4 6

STATUTES

11 U.S.C. § 330(a) 4, 7, 10, 11

11 U.S.C. § 330(a)(1) 3

11 U.S.C. § 330(a)(1)(A) 9

11 U.S.C. § 330(a)(3) 11

11 U.S.C. § 330(a)(3)(C) 8, 10

11 U.S.C. § 330(a)(3)(F) 10

11 U.S.C. § 330(a)(4)(A) 3, 10

11 U.S.C. § 330(a)(6) 11

28 U.S.C. § 2412(d)(1)(A) 9

RULES

Fed. R. Bankr. P. 9011 2

Fed. R. Civ. P. 11 2

MISCELLANEOUS

Pardo & Watts, The Structural Exceptionalism Of Bankruptcy Administration, 60 UCLA L. Rev. 384 (2012) 6

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REPLY FOR PETITIONERS

Two of the busiest bankruptcy circuits are divided over a recurring, purely legal issue. ASARCO's denial of any material split contradicts the opinion below, the relevant Ninth Circuit opinions, and its own lower-court briefing. ASARCO's dismissal of the issue's importance likewise contravenes the opinion below and industry *amici*'s informed views. No one disputes that the Fifth Circuit's categorical rejection of fee-defense compensation presents an ideal vehicle. Certiorari is warranted.

I. THERE IS A MATERIAL SPLIT BETWEEN AT LEAST TWO BANKRUPTCY-HEAVY CIRCUITS

The opinion below candidly acknowledged that the Fifth and Ninth Circuits are now divided over whether § 330 grants bankruptcy courts discretion to award com-

pensation for successfully defending fee applications. Pet. App. 15a-16a. ASARCO concedes that those courts "read § 330 differently," but contends they have not created "a conflict that matters." BIO 9, 10. Why? Because (according to ASARCO) both circuits would award compensation for defending against "frivolous" objections to a fee application, and neither would grant compensation for defending against non-frivolous objections.

1. Merely reading the decisions refutes this jurisprudential revisionism. Courts always have "inherent" power to award fees for defending against frivolous or bad-faith litigation, as an "exceptio[n]" to the American Rule. *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 45-46 (1991); Fed. R. Civ. P. 11; Fed. R. Bankr. P. 9011. But this rarely invoked truism is irrelevant to whether bankruptcy courts have discretion *under § 330* to award fees in the far more common scenario of successfully defending against *non-frivolous* objections. *That* is the important, recurring question that divides the circuits.[1]

2. ASARCO finds no material split on that point because certain objections in *In re Smith*, 317 F.3d 918 (9th Cir. 2002), were denoted "frivolous." ASARCO uses the Ninth Circuit's fleeting characterization of those objections to misrepresent that the Ninth Circuit—like the Fifth—denies bankruptcy courts discretion to award fees under § 330 for successfully defending against *non-frivolous* objections. In fact, the courts could not be farther apart on this issue. The Fifth Circuit repudiated every aspect of the Ninth Circuit's interpretation of § 330. See Pet. 18-19. And the Ninth Circuit's careful

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[1] Petitioners had no reason to argue that ASARCO's wholly meritless objections met the stringent bad-faith test. See BIO 11-12. Nearly every court awarded fees for successfully defending fee applications, see Pet. 21-22, and ASARCO's counsel initially conceded that § 330 authorizes defense fees. Pet. App. 135a.

statutory analysis turned not on the frivolity of certain objections in that case, but on the recognition that

- fee-application defense benefits the estate and is necessary to close a case;
- defense fees are essential to preventing dilution of bankruptcy compensation;
- denying defense fees would incentivize meritless objections; and
- cases interpreting fee-shifting statutes authorize defense-fee compensation to avoid dilution.

See *ibid.*; *Smith*, 317 F.3d at 928-929.

The *Smith* court's *holding* was clear: To obtain defense fees, "the fee applicant must demonstrate that the services for which compensation is sought satisfy the requirements of section 330(a)(4)(A) *and* that its case exemplifies a 'set of circumstances' where the time and expense incurred by the litigation is 'necessary' within the meaning of section 330(a)(1)." 317 F.3d at 928. Far from restricting defense fees to the narrow realm of sanctions for frivolous objections, *Smith* emphasized that they are "largely a matter within the informed discretion of the bankruptcy court." *Id.* at 929. This holding reaffirmed the Ninth Circuit's § 330 precedents. See Pet. 15-19. *Smith*'s extended analysis of § 330 and those precedents would have been unnecessary if compensability turned on certain objections' frivolousness. See 317 F.3d at 929 (mentioning frivolousness only to support policy argument that denying defense fees would "encourage debtors to file meritless objections to fee applications").

Indeed, ASARCO's re-imagining of *Smith* fails even on its own terms. For *Smith* affirmed two law firms' defense-fee awards, only the first of which involved frivolous objections. See 317 F.3d at 922, 928-929. The court affirmed the second award "[f]or the same reasons discussed in connection with [the first firm]," even though

the second firm's fee defense was only "mostly successful." *Id.* at 929. ASARCO's crucial assertion that the Ninth Circuit "made no holding about whether fees could be awarded under § 330 in the absence of [frivolousness]" is thus doubly mistaken. See BIO 9; *id.* at 1, 15.[2]

The Fifth Circuit knew precisely what *Smith* "ultimately held": "[Defense-fee] compensation rests within the bankruptcy court's discretion to award fees for 'reasonable and necessary work.'" Pet. App. 16a (quoting 317 F.3d at 929). It simply disagreed, categorically concluding that "Section 330(a) does not authorize compensation for the costs counsel or professionals bear to defend their fee applications." *Id.* at 14a. The split could not be starker.

3. Finally, ASARCO asserts that the Ninth Circuit might have denied defense fees here because "ASARCO's objections resulted in a meaningful reduction of the fees that petitioners were seeking." BIO 12 (citing *In re Riverside-Linden Inv. Co.*, 945 F.2d 320, 322-323 (9th Cir. 1991)). ASARCO omitted this argument below for good reason: the "meaningful reduction" it cites is Baker Botts' "agree[ment] voluntarily to credit" about $132,000 to the estate for certain time entries and expenses—roughly *one-tenth of 1%* of Baker Botts' core fees. Pet. App. 145a. In *Riverside-Linden*, by contrast, the Ninth Circuit affirmed the denial of defense fees because the fee application was "meritless" and "filed merely to get litigation fees." *Smith*, 317 F.3d at 928, 929 (recounting *Riverside-Linden*). Here, after Baker Botts

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[2] The Ninth Circuit confirmed its approach in *In re Wind N' Wave*, recounting *Smith*'s § 330 analysis at length—without mentioning objections' frivolousness. 509 F.3d 938, 943 (2007). The court then applied "the *Smith* standard" to a "nearly identical" Code provision and awarded creditors defense fees without finding the defeated objections frivolous. *Id.* at 944, 946. ASARCO's dismissal of *Wind N' Wave* as addressing a different statute (BIO 17 n.6) again fails to take the Ninth Circuit at its word.

took *de minimis* deductions and litigated ASARCO's challenges to the remaining 99.9% of its fees, the court rejected *all* of ASARCO's objections.[3] The Ninth Circuit plainly would have affirmed the discretionary defense-fee award on these facts. See *id.* at 929 (affirming awards where objections were all or "mostly" rejected).

4. ASARCO was more honest about *Smith* in its briefing below. It never contended that it could prevail under *Smith* because its objections were non-frivolous or caused "meaningful reduction[s]." Instead, ASARCO recognized that *Smith* doomed its appeal, so it urged the Fifth Circuit to reject *Smith* as "wrongly decided" and "inconsistent with [opinions] that denied fees for defending a fee application." 5th Cir. Reply Br. 22, 26 (filed Mar. 8, 2013). Having per-

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[3] ASARCO's claim that this statement is "inaccurate" (BIO 3) is puzzling, for it comes directly from *the Fifth Circuit's* observation that "the bankruptcy court rejected all of ASARCO's objections to the core fee request." Pet. App. 3a. ASARCO similarly disputes the petition's statement that ASARCO did not challenge the amount of defense fees, asserting that the bankruptcy court found petitioners' initial request "higher than [was] reasonable and necessary." BIO 3-4 (quoting Pet. App. 142a), 5 n.1. In context, the petition's point was clear: this case presents a clean vehicle because *at the court of appeals* ASARCO did not challenge the amount of defense fees awarded below; it asserted only—and the Fifth Circuit agreed—that defense fees are barred as a matter of law. ASARCO seems to be referencing the bankruptcy court's reduction of Baker Botts' requested core-fee *enhancement* and the lower courts' denial of fees for pursuing the enhancement. BIO 3, 4. The latter ruling is what caused the reduction from the $8 million requested to the $5 million awarded for defense fees. See Pet. App. 148a-149a, 160a-161a, 165a. But ASARCO's "success" on those issues is irrelevant; Baker Botts seeks fees only for successfully defending its *core-fee* application—not pursuing the enhancement—and that is the issue dividing the circuits. See Pet. App. 4a & n.3 (noting that "Baker Botts did not appeal [the] ruling" denying fees for "pursuit of its fee enhancement" and that the lower courts found that the entire $5 million defense-fee award "compensated Baker Botts for defending core fees").

suaded the Fifth Circuit, ASARCO cannot now credibly claim that the split makes no difference on these facts.

II. The Issue Is Important And Warrants Immediate Review

1. ASARCO does not dispute that this Court commonly resolves 1-1 or 2-1 splits involving bankruptcy-heavy circuits. See, *e.g.*, *Clark* v. *Rameker*, 134 S. Ct. 2242, 2246 (2014) (1-1 split between Fifth and Seventh Circuits); *Radlax Gateway Hotel, LLC* v. *Amalgamated Bank*, 132 S. Ct. 2065 (2012) (petition and BIO debate 1-1 or 2-1 split involving Fifth Circuit); *Hall* v. *United States*, 132 S. Ct. 1882, 1886 & n. 1 (2012) (1-1 split between Eighth and Ninth Circuit when granted; Tenth Circuit ruled post-grant). That practice honors the Constitution's call for "uniform laws on the subject of Bankruptcies throughout the United States," Art. I, § 8, cl. 4. And it reflects that "the current appellate structure of the bankruptcy system" results in "relatively few bankruptcy appeals mak[ing] their way up to the circuit courts." Pardo & Watts, The Structural Exceptionalism of Bankruptcy Administration, 60 UCLA L. Rev. 384, 438-439 (2012); see Florida *Amicus* Br. 17. ASARCO's claim that this issue reaches the circuit level only once a decade makes review *more* urgent to avoid consigning the bankruptcy system to disarray for another decade or more.[4]

2. Further "percolation" would only deepen an entrenched split and delay resolution of an issue routinely affecting bankruptcies. There is no prospect that *Lamie* v.

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[4] ASARCO perceives no harm to the bankruptcy system in the "numerous" courts that deny defense fees. BIO 17, 24. But only two bankruptcy courts consistently do so, see Pet. 22; the Fifth Circuit ruled only months ago; and lower courts in the Eleventh Circuit frequently award defense fees. See Florida *Amicus* Br. 12-13. Practitioner *amici*, moreover, detail the damage that would ensue if the decision below stands. *Id.* at 15-18; Texas *Amicus* Br. 13-18.

U.S. Trustee, 540 U.S. 526 (2004)—a case having nothing to do with defense fees—will cause the Ninth Circuit to abandon its established view.[5] ASARCO's interpretation of *Lamie* (BIO 15-16) is so implausible that it did not raise it until its Fifth Circuit reply brief; the opinion below ignored it; and no post-*Lamie* court addressing defense fees has even mentioned it.

ASARCO emphasizes that the Second and Third Circuits have not yet weighed in, asserting that the Southern District of New York and the District of Delaware attract mega-bankruptcies that are supposedly likeliest to have defense-fee litigation. BIO 15 & n.4. But courts in those districts routinely award defense fees, including the influential decision by now-Third Circuit Judge Jordan in *In re Worldwide Direct Inc.*, 334 B.R. 108 (D. Del. 2005). See Pet. App. 167a-169a. And, in fact, over 85% of reported decisions litigating defense fees arise *outside of* those districts. See *id.* at 167a-171a.

3. ASARCO's claim that the question presented is unimportant (BIO 16-18) strains credulity. The Fifth Circuit certainly saw its importance: "The issues presented transcend debtor's counsel, because Section 330(a) governs compensation of all professionals whose fees are paid by the bankruptcy estate." Pet. App. 14a. The court understood that all such professionals *must* file a detailed fee application and respond to any objections. *Id.* at 15a. Allowing geography to dictate the ground rules for something so fundamental invites chaos. See Texas *Amicus* Br. 13-20; Florida *Amicus* Br. 14-20.

ASARCO nonetheless argues that *since 1978* only three circuits and "only 57 reported cases" from lower courts have addressed defense-fee compensability. BIO 16-17.

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[5] Under *Lamie*, counsel cannot seek § 330 compensation for services rendered to the debtor after a trustee is appointed. 540 U.S. at 529, 538-539. No appointment occurred here.

The opportunistic use of 1978 as a starting point overlooks that the *1994* Amendments clarified that professionals may be compensated for services "necessary for the administration of, or beneficial * * * toward the completion of * * * a case." See Pet. 14-15 (discussing amended § 330(a)(3)(C)). Defense fees were contested in eight reported cases between 1994 and 2005 (with compensability affirmed in seven). The issue began arising more often after *In re Teraforce Technology Corp.* categorically denied defense fees. 347 B.R. 838, 867 (Bankr. N.D. Tex. 2006). Since then, the issue has arisen 27 times in reported opinions. If tallying reported decisions reveals importance, the issue has arisen with impressive and increasing frequency in recent years. And fee litigation will only grow now that the Fifth Circuit has granted a risk-free license to objectors. See Texas *Amicus* Br. 17; Florida *Amicus* Br. 17.[6]

Comparing only reported decisions to all bankruptcies filed, ASARCO declares that fee litigation recurs in an "infinitesimally small percentage" of cases. BIO 17-18. In fact, "the fees of estate professionals are frequently litigated." Texas *Amicus* Br. 17 n.18. The leading study found objections to fees in 10% of all (and 20% of large) Chapter 11 bankruptcies. *Ibid.* That amounts to *over 900* cases annually. None of ASARCO's importance-diminishing gambits can succeed.[7]

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[6] ASARCO again contradicts unappealed findings by faulting Baker Botts' "cho[ic]e" to use 191 timekeepers, denying that its onslaught "forced" extensive fee-defense efforts. Compare BIO 1, 18 n.8, with Pet. App. 142a (finding "unusual circumstances" that "forced [Baker Botts] to respond to Reorganized ASARCO's challenges"). Most timekeepers expended a few hours to respond to ASARCO's "meritless [time-entry] objection," Pet. App. 150a, and demand for "every document" created during the bankruptcy, *id.* at 3a. See Pet. 8-9.

[7] ASARCO's statistical creativity is particularly misleading here, because defense-fee disputes are typically resolved in orders available only on PACER. See Texas *Amicus* Br. 17 n.18; Florida *Amicus*

III. The Judgment Below Is Wrong

1. ASARCO's merits argument hinges on the view that a statute must specifically single out *defense fees* for compensation to overcome the American Rule. But this Court and others consistently interpret statutes that authorize "reasonable attorney fees" (or the like) to include discretion to award defense fees. This Court unanimously awarded "fees for the fee litigation" under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A), which provides simply for "fees * * * incurred by [the prevailing] party in any civil action" against the United States. *Commissioner, INS* v. *Jean*, 496 U.S. 154, 157 (1990). The Court cited cases holding that "denying attorneys' fees for time spent in obtaining them would dilute the value of a fees award by forcing attorneys into extensive uncompensated litigation in order to gain any fees." *Id.* at 162 (citation omitted). The circuits agree. *E.g.*, *Wind N' Wave*, 509 F.3d at 942 ("Along with other circuits, we have granted compensation for litigation over a fee award under fee shifting statutes even when those statutes did not expressly allow for it.") (collecting cases); *Hernandez* v. *Kalinowski*, 146 F.3d 196, 199 (3d Cir. 1998) ("Although the phrase 'fees on fees' appears nowhere in [the PLRA], * * * the key is determining if 'fees on fees' are included within the meaning of fees 'directly and reasonably incurred in proving an actual violation of the plaintiff's rights.'").

Section 330(a)(1)(A)'s provision of "reasonable compensation for actual, necessary services" likewise displaces the American Rule and authorizes discretion to award defense fees, as necessary to avoid core-fee dilution. Moreover, as the Fifth Circuit acknowledged, the Code compensates services that "are likely to benefit a debtor's estate *or are necessary to case administration.*"

Br. 12 & n.4.

Pet. App. 15a (emphasis added); see §§ 330(a)(3)(C), 330(a)(4)(A)(ii). ASARCO—like the court below—never explains why successfully defending fee applications lies outside this express provision. Section 330(a), therefore, contains *more* "explicit statutory guidance" regarding defense fees than other fee-shifting statutes and is equally in "express derogation" of the American Rule. Contra BIO 24 n.9 (quoting Pet. App. 17a-18a).[8]

2. ASARCO discounts as mere "policy" (BIO 24) § 330(a)(3)(F)'s textual mandate that bankruptcy practitioners be compensated equally with non-bankruptcy counsel. And while ASARCO asserts that "the American Rule applies to fee disputes outside of bankruptcy," BIO 24-25, that does not resolve whether the parity principle requires compensation for fee-application defense. Non-bankruptcy lawyers need not prepare detailed fee applications, seek court approval to be paid, and face objections from non-clients. Forcing bankruptcy practitioners to bear the costs of these unique, Code-dictated procedures will inexorably dilute their compensation below that of other counsel. *In re Nucorp Energy, Inc.*, 764 F.2d 655, 659 (9th Cir. 1985).[9] Thus, the Ninth Circuit found the "closest parallel" for parity purposes to be "the time that attorneys spend calculating and justifying their fees in other types of cases in which fees are awarded by the court." *Ibid.* As discussed *supra*, at 9, defense fees are uniformly available in such settings.

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[8] *Key Tronic Corp.* v. *United States* does not support ASARCO's super-clear-statement rule for defense fees; none of the statutory provisions there "expressly mention[ed] the recovery of attorney's fees" at all. 511 U.S. 811, 815 (1994).

[9] The lack of parity is especially striking here: the *client* paid Baker Botts' fees without complaint. A third party that Baker Botts defeated in litigation—Reorganized ASARCO—then challenged those fees. That could not happen outside of bankruptcy; a lawyer whose client willingly pays his fees expends little cost in collecting them.

3. ASARCO draws a negative inference from § 330(a)(6)'s provision that "[a]ny compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application." But that plain text does not *grant authority* to award fees for preparing the application; it instructs courts *how* to exercise their discretion to award such fees that are otherwise compensable under § 330(a). Consequently, there is no implication that courts lack authority to award fees for defending applications.

This Court rejected a similar argument in *Setser* v. *United States*, 132 S. Ct. 1463 (2012), refusing to draw a negative inference from a provision that was "framed not as a conferral of authority but as a limitation of authority that already exists." *Id.* at 1469. Just so here: Section 330(a)'s broad provisions grant discretion to award defense fees, and § 330(a)(6) "in no way implies a repeal of [this] preexisting authority." *Ibid.* Nor is § 330(a)(6) superfluous under petitioners' view, because its precise limitation is not included elsewhere in § 330(a)(3), and Congress wished to emphasize that "scrivener's skills" (Pet. App. 15a-16a) should involve lower rates than substantive legal work. See Florida *Amicus* Br. 9 (discussing legislative history). After discarding ASARCO's misreading of § 330(a)(6), there is "no textual or logical argument for treating so differently a party's preparation of a fee application and its ensuing efforts to support that same application." *Jean*, 496 U.S. at 162; see Pet. 28-30.[10]

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[10] The Fifth Circuit correctly ignored ASARCO's invocation of "congressional silence." BIO 22. "[F]ailed legislative proposals"—much less isolated testimony to a single committee two years before passage—"are a particularly dangerous ground on which to rest an interpretation * * * because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Cent. Bank of Denver* v. *First Interstate Bank of Denver*, 511 U.S. 164, 187 (1994).

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Supreme Court of the United States

BAKER BOTTS L.L.P. AND JORDAN, HYDEN, WOMBLE, CULBRETH & HOLZER, P.C.,

Petitioners,

v.

ASARCO LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE BUSINESS LAW SECTION OF THE FLORIDA BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS..... i

TABLE OF CITED AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT... 2

ARGUMENT..... 5

I. The Fifth Circuit Misinterpreted the Relevant Statute and Misapprehended Sister-Circuit Precedent 5

A. Text and history show that Congress did not intend to categorically exclude compensation for fee litigation.....5

B. The Fifth Circuit's reliance on Eleventh Circuit precedent misinterpreted that authority and misunderstood its impact on bankruptcy practice in the Eleventh Circuit . ..... .10

II. Establishing Uniformity on this Issue Is Critically Important to the Day-to-Day Practice of Bankruptcy Lawyers 14

Table of Contents

Page

A. Reducing Section 330 fees through uncompensated fee litigation will tend to dilute the quality of the bankruptcy bar, inflate rates charged for bankruptcy work, or both. 14

B. Unless resolved, the Fifth Circuit's break with the majority view will invite satellite fee litigation in the other major bankruptcy jurisdictions 17

C. The U.S. Trustee Program's guidelines underscore the courts' division on compensation for fee defense and the need for review by this Court. 18

CONCLUSION 21

TABLE OF CITED AUTHORITIES

Page

CASES

Bd. of Cnty. Comm'rs v. Umbehr,
518 U.S. 668 (1996) 17

Bonner v. City of Prichard,
661 F.2d 1206 (11th Cir. 1981)(en banc) .... .11

Boyd v. Engman,
404 B.R. 467 (W.D. Mich. 2009) 7, 18

Grant v. George Schumann Tire & Battery Co.,
908 F.2d 874 (11th Cir. 1990). 3, 10, 11

In re Busy Beaver Bldg. Ctrs., Inc.,
19 F.3d 833 (3d Cir. 1994) 7

In re Cahill,
428 F.3d 536 (5th Cir. 2005) 7

In re Catalina Spa & R.V. Resort, Ltd.,
97 B.R. 13 (Bankr. S.D. Cal. 1989)..... .13

In re Claudio,
459 B.R. 500 (Bankr. D. Mass. 2011).. .6-7

In re Concrete Prods., Inc.,
No. 88-20540, 1993 WL 13726054
(Bankr. S.D. Ga. July 27, 1993)..... 13

Cited Authorities

Page

In re First Colonial Corp. of Am.,
544 F.2d 1291 (5th Cir. 1977) 7

In re Hambrick,
No. 08-66265, 2012 WL 10739279
(Bankr. N.D. Ga. Apr. 10, 2012) 12

In re Jankowski,
382 B.R. 533 (Bankr. M.D. Fla. 2007). 12

In re Key Airlines,
No. 93-40226, 1994 WL 16005203
(Bankr. S.D. Ga. Mar. 21 1994). 12

In re McClanahan,
137 B.R. 73 (Bankr. M.D. Fla. 1992) 13

In re Motors Liquidation,
No. 09-50026 (Bankr. S.D.N.Y. Nov. 23, 2010) 12, 20

In re Smith,
317 F.3d 918 (9th Cir. 2002)..... 20

In re The New Power Co.,
Nos. 02-10835, 02-10836, 02-10837, 2007 WL
7143077 (Bankr. N.D. Ga. June 25, 2007) 13

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540 U.S. 526 (2004)... ....2, 5, 14

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Page

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108 B.R. 333 (Bankr. M.D. Fla. 1989) 13

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STATUTES & OTHER AUTHORITIES

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11 U.S.C. § 330..... ..... *passim*

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11 U.S.C. § 330(a)(1)(A)..... 5

11 U.S.C. § 330(a)(3)(A)-(B) 5

11 U.S.C. § 330(a)(3)(C). 2, 5, 6, 8

11 U.S.C. § 330(a)(3)(F).... ..... .15

11 U.S.C. § 330(a)(4)(A)..... 5

11 U.S.C. § 330(a)(6) 8

28 U.S.C. § 586(a)(3) 18

28 U.S.C. § 586(a)(3)(A)..... 19

Cited Authorities

Page

78 Fed. Reg. 36250 (June 17, 2013) 19, 20

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Brenda Hacker Osborne, Note, *Attorneys' Fees in Chapter 11 Reorganizations: A Case for Modified Procedures*, 69 Ind. L.J. 581 (1994).....18

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Cited Authorities

Page

H.R. Rep. 95-595, 95th Cong, 1st Sess. (1977) 2, 14, 15, 16

Martin J. Bienenstock *et al.*, *Response to "Routine Illegality in Bankruptcy Court, Big-Case Fee Practices"*, 83 Am. Bankr. L.J. 549 (2009) ..... .15

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S. Rep. No. 102-279, 102d Cong., 2d Sess. (1992).....14

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Stephen J. Lubben, *The Clash Over Bankruptcy Fees*, N.Y. Times (Feb. 4, 2011) 19

Teresa A. Sullivan *et al.*, *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 Harv. J.L. & Pub. Pol'y 801 (1994) ... .14

Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 Stan. L. Rev. 747 (2010) 4, 17

INTEREST OF *AMICUS CURIAE*[1]

The Business Law Section of the Florida Bar is a voluntary organization within the Florida Bar for members interested in corporate law, banking, business, bankruptcy, computer and cyber law, antitrust and franchise law, litigation, and related areas of law. Its purpose is to provide a forum for the discussion and exchange of ideas leading to the improvement of the laws relating to these areas. The Business Law Section has filed *amicus* briefs with the United States Supreme Court, the United States Courts of Appeals, and the Florida Supreme Court in cases involving bankruptcy-related issues. The Business Law Section also actively participates in legislative initiatives contemplating amendments to the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and applicable Florida statutes. *Amicus* thus has a strong interest in the proper interpretation and administration of the Bankruptcy Code.[2]

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1. Pursuant to Supreme Court Rule 37.6, counsel for *Amicus* states that no counsel for a party authored this brief in whole or in part, and no party or counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus*, its members, or its counsel, made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.2, *Amicus* states that Petitioners and Respondent, upon timely receipt of notice of *Amicus*'s intent to file this brief, have consented to its filing.

2. This brief was reviewed by the Executive Committee of the Board of Governors of The Florida Bar on August 26, 2014, consistent with applicable standing board policies. It is tendered solely by the Business Law Section and supported by the separate resources of this voluntary organization—not in the name of The Florida Bar, and without implicating the mandatory membership fees paid by any Florida Bar licensee.

SUMMARY OF ARGUMENT

1. "For over 100 years debtors' attorneys have been considered by Congress and the courts to be an integral part of the bankruptcy process." *Lamie v. U.S. Trustee*, 540 U.S. 526, 529 (2004). To "enable the system to operate smoothly, efficiently, and expeditiously," H. Rep. No. 95-595, 95th Cong, 1st Sess, 330 (1977), Congress has empowered the courts to award professional fees under the Bankruptcy Code. Section 330(a)(1) vests broad discretion in the courts to provide "reasonable compensation" for services that are "actual" and "necessary." 11 U.S.C. § 330(a)(1).

On the strength of Section 330, most courts to consider the issue have held that professionals can receive compensation in connection with defending their fee applications. Fee litigation is a recurring part of the bankruptcy process, and resolving professionals' claims is, quite literally, "necessary to the administration of, or beneficial ... toward the completion of, a case under" Title 11. *Id.* § 330(a)(3)(C). Without resolving outstanding professional-fee issues, a bankruptcy case cannot be closed.

The Fifth Circuit largely agreed with these general principles, acknowledging that fee-related proceedings are "[i]mplicit" in bankruptcy cases. Pet. App. 15a. Yet it nonetheless held that courts can *never* award professional fees in connection with these proceedings. In other words, despite having acknowledged that the resolution of fee disputes is required to close a bankruptcy case, the court below held that defending fee applications are, as a matter of law, never "necessary to the administration of,

or beneficial ... toward the completion of" that case. 11 U.S.C. § 330(a)(1).

In reaching this atextual result, the Fifth Circuit misinterpreted both Section 330 and the key sister-Circuit precedent on which it relied. In particular, the court drew inspiration from an Eleventh Circuit decision, *Grant v. George Schumann Tire & Battery Co.*, 908 F.2d 874 (11th Cir. 1990), which, in the Fifth Circuit's view, held that fee-related services are never covered by Section 330. In truth, though, *Grant* actually upheld the lower courts' discretion in awarding fees. And notwithstanding dicta in that decision, bankruptcy courts in the Eleventh Circuit regularly award compensation in connection with fee defense.

Thus, the Fifth Circuit's decision breaks new ground at the appellate level. The court openly parted ways with the Ninth Circuit and established itself on the minority side of a split that has been developing in the trial courts for more than two decades. Indeed, guidelines issued by the U.S. Trustee Program suggest that the Executive Branch, too, is struggling with this division in authority. Despite a statutory charge to apply its fee guidelines "uniformly," the U.S. Trustee Program has announced two divergent views on Petitioners' question presented and has ultimately settled on considering the compensability of fee-related services on a patchwork, district-by-district basis.

2. The practical consequences of this split are profound. Congress's point in enacting and amending Section 330 was to "attract high caliber professionals to handle bankruptcy cases." George W. Kuney, *Hijacking Chapter 11*, 21 Emory Bankr. Dev. J. 19, 42 (2004).

Congress recognized that a system that undercompensates its best professionals will quickly lose them. Yet the Fifth Circuit's decision—and others like it—directly undercut Congress's purpose. By categorically barring its lower courts from awarding fees in connection with fee litigation, the Fifth Circuit's decision ensures that whatever fees are awarded will be diluted by the hours of uncompensated time spent defending them.

As the only Circuit-court decision on the minority side of the split, moreover, the Fifth Circuit's ruling invites fee-objectors to revisit this issue in the ten Circuits whose courts of appeals have not yet addressed the matter. Respondent sees this uptick in satellite fee litigation as an asset, claiming that the issue will benefit from "more percolation ... in the circuit courts." BIO 14. But it is highly unlikely that this question will reach many future appellate courts (as the past two decades show). "Factors unique to bankruptcy litigation limit the ability of disputes to make their way to the courts of appeals." Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 Stan. L. Rev. 747, 787 (2010). A more likely outcome is that fee-objectors will exploit the Fifth Circuit's decision as a tactical measure, either to browbeat counsel into accepting lower fees or even to influence the litigation decisions of debtors' estates more broadly. This Court should grant certiorari both to correct the Fifth Circuit's interpretation of Section 330 and to put to rest the lower courts' well-developed split in authority.

ARGUMENT

I. The Fifth Circuit Misinterpreted the Relevant Statute and Misapprehended Sister-Circuit Precedent.

A. Text and history show that Congress did not intend to categorically exclude compensation for fee litigation.

Section 330(a)(1) authorizes the courts to award professional fees under the Bankruptcy Code, "including fees for services rendered by attorneys in connection with bankruptcy proceedings." *Lamie v. U.S. Trustee*, 540 U.S. 526, 529 (2004). The law vests broad discretion in the courts, empowering them to provide "reasonable compensation" for services that are "actual" and "necessary." 11 U.S.C. § 330(a)(1)(A).

This grant of power is tailored by other provisions. For example, the court must consider "all relevant factors," and Section 330(a)(3) prescribes six considerations that the court must take into account. Some are commonsense—"the time spent on ... services," for instance, and "the rates charged for such services." *Id.* § 330(a)(3)(A)-(B). Others tether the award to services that were actually performed in connection with the proceeding; in particular, the Code instructs an awarding court to consider "whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title." *Id.* § 330(a)(3)(C); *see also id.* § 330(a)(4)(A) (disallowing fees for services not reasonably likely to benefit the debtor's estate and not "necessary to the administration of the

case"). At base, the courts must take care that the fees awarded are fair—both to the estate and to counsel—and that they have a nexus with the proceeding itself.

Fees incurred in litigating fee applications fit comfortably within Section 330(a)'s zone of discretion—as most courts to have considered the issue have held. *See* Pet. App. 167a-171a. Even before the Bankruptcy Reform Act of 1994, the American Bankruptcy Institute remarked that, "[i]n many jurisdictions, professionals are compensated from estate assets for their efforts in presenting and defending fee applications." Comm. on the Judiciary, Hearing on Professional Fees in Bankruptcy (Mar. 24, 1992) (selected excerpts from Am. Bankr. Inst., American Bankruptcy Institute National Report on Professional Compensation in Bankruptcy Cases (G.R. Warner rep. 1991) (hereinafter "Warner")); *see also* Warner, *supra*, at 196 ("A majority of the more recently reported decisions tend to allow compensation for the preparation and presentation of fee applications.").

This makes good sense. Bankruptcy cases cannot be closed until the claims of all third parties—including trustees, examiners, attorneys, accountants, and others—have been resolved. Litigating fee applications is, in quite a literal sense, "necessary to the administration of, or beneficial ... toward the completion of, a case" under Title 11. 11 U.S.C. § 330(a)(3)(C). It is an integral part of bankruptcy proceedings. Section 330 provides for notice to the parties in interest and the U.S. Trustee and the opportunity for a hearing on any fee application. *Id.* And the courts themselves "ha[ve] an independent judicial responsibility to review the fees of professionals, even in the absence of an objection by a party in interest." *In*

re Claudio, 459 B.R. 500, 512 (Bankr. D. Mass. 2011). The Fifth Circuit, in fact, has embraced one of the most involved fee-application processes in the nation, ruling that each bankruptcy judge has a "duty to hold ... [an evidentiary] hearing on his own motion" whenever a fee application does not "adequately develop the factual basis for the awards." *In re First Colonial Corp. of Am.*, 544 F.2d 1291, 1300 (5th Cir. 1977), *superseded by statute on other grounds*; *see also In re Cahill*, 428 F.3d 536, 540 n.6 (5th Cir. 2005). In short, "[p]reparing and defending attorney fee applications is part and parcel with the attorney's role in the administration of the bankruptcy process." *Boyd v. Engman*, 404 B.R. 467, 483 (W.D. Mich. 2009).

In reaching the opposite conclusion, the Fifth Circuit threw in its lot with the minority side of a split that has been maturing since even before the 1994 amendments to the Bankruptcy Code. *See, e.g., In re Busy Beaver Bldg. Ctrs., Inc.*, 19 F.3d 833, 843 (3d Cir. 1994) (remarking on the "split of authority regarding whether time spent pursuing fees is compensable"); Deborah D. Williamson & Lynnelle Loke, *Compensation for Time Spent Preparing and Prosecuting Fee Applications*, 1991 Ann. Surv. of Bankr. Law 15 (itemizing split in 1991); *see also* Warner, *supra*, at 194 (noting, in 1991, that "the bankruptcy courts remain split"). The Fifth Circuit accepted that litigating fee disputes is a necessary part of the administration of bankruptcy cases. Pet. App. 15a. Yet at the same time, the court maintained that professional fees incurred in that litigation are categorically out of bounds under Section 330(a)(1). Put another way, the court singled out fees for proceedings that are an "[i]mplicit" part of a bankruptcy case (Pet. App. 15a) and held that they can *never* be "necessary to the administration of, or beneficial

... toward the completion of" that case. 11 U.S.C. § 330(a)(3)(C); Pet App. 14a.

To reach this atextual result, the Fifth Circuit relied on Section 330(a)(6), a provision that is meant not to confer the authority to award fees but to guide the exercise of that authority. Section 330(a)(6) devises a unique limit on the courts' otherwise ample discretion, identifying "compensation awarded for the preparation of a fee application" for special treatment. Unlike other fees awarded under Section 330—which are keyed to the fees charged by comparable non-bankruptcy practitioners—compensation for preparing fee applications "shall be based on the level and skill reasonably required to prepare the application." 11 U.S.C. § 330(a)(6).

As interpreted by the Fifth Circuit, this provision withdrew the courts' discretion to award compensation for any other services related to fee applications. Because Section 330(a)(6) mentions only preparing fee applications, the court noted, it does not "encompass satellite litigation over [those] ... application[s]." Pet. App. 16a. Reasonably read, the narrowness of Section 330(a)(6) means that the courts have discretion to compensate for other fee-related services as they would any other "actual" and "necessary" service. But the Fifth Circuit saw it differently. In the court's view, Section 330(a)(6) marks the metes and bounds of compensation for all fee-related services. As a result, Congress's failure to single out any other fee-related services in Section 330(a)(6) meant that those services are categorically outside the zone of compensation in Section 330(a)(1).

This reading conflicts with both text and history. As Petitioners have explained, "§330(a)(6) is not a textual grant, much less an implicit denial, of authority." Pet. 29. Instead, it cabins the courts' discretion in awarding fees for a subset of services that are otherwise compensable under Section 330(a)(1). When determining fees for all other "necessary, actual services," the courts must consider the rates of comparably skilled non-bankruptcy counsel. But for the "clearly different" (Pet. App. 15a), ministerial act of preparing a fee application, the courts must base compensation on the "level and skill" involved. In Petitioners' words, Section 330(a)(6) simply "provides a metric" for calculating fees for a particular type of service that the courts are empowered to compensate. Pet. 29. The provision does not define the bounds of the courts' discretion; it simply addresses the mechanics of exercising that discretion for a particular type of service.

The legislative history only confirms Petitioners' interpretation. The original proposed draft of Section 330(a)(6) leaves no doubt that the provision serves to direct "the court[s] [to] recognize the difference between the cost of professional services and services for the preparation of fee applications" when "determining the amount to be awarded for the preparation of fee applications." S. Rep. No. 103-168, 103d Cong., 1st Sess., 27 (1993). In other words, as Petitioners have argued, the provision "does not determine whether, but *how much*, to compensate for preparation." Pet. 29. Nor does it abridge the other types of services—including fee-related services—that the lower courts have discretion to compensate under Section 330(a).

B. The Fifth Circuit's reliance on Eleventh Circuit precedent misinterpreted that authority and misunderstood its impact on bankruptcy practice in the Eleventh Circuit.

In declaring a categorical bar on fee-related compensation, the Fifth Circuit leaned on the Eleventh Circuit opinion in *Grant v. George Schumann Tire & Battery Co.*, 908 F.2d 874 (11th Cir. 1990). According to the Fifth Circuit, *Grant* blazed the trail by holding that services relating to professional fees can never be covered by Section 330. Pet. App. 15a. In truth, *Grant* says nothing of the sort, and it provides little guidance on the question whether fees can be awarded when a professional is successful in defending a fee application.

In *Grant*, debtor's counsel sought final fees in the amount of $138,400.00, but the bankruptcy court awarded only $35,725.88 after finding that counsel spent more time on the case than was necessary. *Id.* at 877. The debtor appealed even though the award was actually in its favor, and counsel filed a cross-appeal. The district court vacated the fee award and remanded for a *de novo* determination that included an explanation for the award. *Id.* A second bankruptcy judge considered the matter on remand and awarded the same reduced fee of $35,725.88. *Id.* Counsel appealed again, and the district court affirmed the fee award after conducting a *de novo* review. *Id.*

The Eleventh Circuit affirmed the district court's ruling, finding that counsel took unnecessary and self-serving actions in the case that resulted in a misadministration of the bankruptcy estate. *Id.* at 885. For those same reasons, the Eleventh Circuit denied counsel's

request for an award of fees incurred in prosecuting the appeal. *Id.* at 882 n.19.

In reaching its decision, the court in *Grant* noted that the award of $35,725.88 actually included $4,000.00 that could be attributed to fees incurred in the first appeal and remand. *Id.* at 882. In addition, *Grant* affirmed the bankruptcy court's fee award; it upheld the lower court's broad discretion to award compensation—or not—for professional services related to the bankruptcy proceeding. *See id.* (affirming bankruptcy court's judgment that counsel "was not entitled to remuneration under section 330 for defending the appeal."). To be sure, the Eleventh Circuit's opinion has its share of dicta. *See id.* at 883 ("If [the bankruptcy court] erred in calculating [counsel's] fee, it erred by 'paying' him for services rendered to himself and not to the estate."). But unlike the Fifth Circuit here, *Grant*'s holding affirmed the lower court's exercise of discretion rather than vetoing it. Indeed, a decision barring compensation for all fee-related work would have broken with both Fifth and Eleventh Circuit precedent; the pre-1981 Fifth Circuit stressed that "[i]t would be unduly penurious to require [preparation of a fee application] without granting reasonable compensation." *Rose Pass Mines, Inc. v. Howard*, 615 F.2d 1088, 1093 (5th Cir. 1980).[3]

In practice, moreover, not even the courts in the Eleventh Circuit read *Grant* as an across-the-board

3. The Eleventh Circuit has adopted as binding precedent all decisions of the former Fifth Circuit issued before October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*).

bar on compensation for fee litigation. Members of the Florida State Bar find that courts routinely award compensation for defending fee applications. Often, these awards appear in unpublished orders that do not parse out the professional services being compensated.[4] But a fair number of Eleventh Circuit bankruptcy courts have memorialized this position in written opinions. Even before the Bankruptcy Reform Act of 1994, at least one court in the Circuit viewed it as "well-settled ... in this Court that time devoted by counsel to the prosecution of a fee application in a bankruptcy proceeding, if otherwise reasonable, is compensable." *In re Key Airlines*, No. 93-40226, 1994 WL 16005203, at *3 (Bankr. S.D. Ga. Mar. 21 1994). More recently, another court in the Circuit noted that "preparing, presenting and defending the fee application of a law firm representing the trustee is no different than preparing any other legal document or pleading in a contested matter or adversary proceeding." *In re Hambrick*, No. 08-66265, 2012 WL 10739279, at *7 (Bankr. N.D. Ga. Apr. 10, 2012).

Nor are those two decisions outliers. *See, e.g.*, *In re Jankowski*, 382 B.R. 533, 546 (Bankr. M.D. Fla. 2007) (approving fees when trustee's counsel "was compelled to respond to the objections and to prepare for the hearing that was scheduled on the fee applications" and "recogniz[ing] the importance of compensating trustees and their counsel for work performed in difficult Chapter

4. This practice is not unique to the Eleventh Circuit; bankruptcy courts nationwide regularly dispose of fee-related issues via unpublished orders. *See, e.g.*, Bench Decision, *In re Motors Liquidation*, No. 09-50026, at 2 (Bankr. S.D.N.Y. Nov. 23, 2010) ("authoriz[ing] payment of the costs of defending against [an] objection if the fee applicant substantially prevails").

7 cases, so that competent professionals are encouraged to accept the employment"); *In re The New Power Co.*, Nos. 02-10835, 02-10836, 02-10837, 2007 WL 7143077, at *9 (Bankr. N.D. Ga. June 25, 2007) ("Services rendered in preparing and defending the fee application are compensable to the extent that the Court has found that the underlying services resulted in a substantial contribution.");[5] *In re Concrete Prods., Inc.*, No. 88-20540, 1993 WL 13726054, at *3 (Bankr. S.D. Ga. July 27, 1993) (approving fees when counsel "was required to prepare for and attend three different hearings on [his] application where he made arguments, presented evidence and called witnesses to counter the objections to his application and motion by the debtor"); *Matter of Bilgutay*, 108 B.R. 333, 339 (Bankr. M.D. Fla. 1989) (noting that "other bankruptcy courts have found fees and costs of defending a fee application not compensable" but nonetheless approving costs associated with defending fee application). *But see In re McClanahan*, 137 B.R. 73, 76 (Bankr. M.D. Fla. 1992) (citing *Grant* for the proposition that "compensation for time spent defending a fee application on appeal has been disallowed"). Far from treading a well-worn path, then, the Fifth Circuit's decision broke with the practice of the courts in the Eleventh Circuit. It also split with the Ninth Circuit, Pet. App. 16a, and establishes an uncompromising bar on fee-related compensation that is unlike any other Circuit precedent in the nation.

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5. *In re The New Power Co.* involved a fee application under 11 U.S.C. § 503(b), not Section 330. But "[a]s an attorney seeking fees under § 503(b) must apply to the court in the same manner as an attorney under § 330," courts have viewed the provisions similarly "for purposes of compensation for fee applications. " *In re Catalina Spa & R.V. Resort, Ltd.*, 97 B.R. 13, 21 (Bankr. S.D. Cal. 1989), *cited in In re The New Power Co.*, 97 B.R. at 9 n.2.

II. Establishing Uniformity on this Issue Is Critically Important to the Day-to-Day Practice of Bankruptcy Lawyers.

A. Reducing Section 330 fees through uncompensated fee litigation will tend to dilute the quality of the bankruptcy bar, inflate rates charged for bankruptcy work, or both.

"For over 100 years debtors' attorneys have been considered by Congress and the courts to be an integral part of the bankruptcy process." *Lamie*, 540 U.S. at 539. Because "[t]he bankruptcy system is complex and difficult to maneuver within," Teresa A. Sullivan et al., *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 Harv. J.L. & Pub. Pol'y 801, 863 (1994), specialized attorneys are critical to the effective, efficient processing of bankruptcy cases.

Congress has long appreciated this unique need for skilled counsel. As early as 1977, Congress recognized that "[b]ankruptcy specialists" play an indispensable role in "enabl[ing] the system to operate smoothly, efficiently, and expeditiously." H. Rep. No. 95-595, 95th Cong, 1st Sess., 330 (1977). These sentiments also surfaced in the lead-up to the 1994 amendments, which made "comprehensive changes" to "[t]he subject of professional fees." *Lamie*, 540 U.S. at 529. In the words of Senator DeConcini, "anyone who has read the code understands how complicated an area of law it is," so "[b]ankruptcy professional[s], with a strong knowledge of the law" are among the key actors in keeping the process working. *See* S. Rep. No. 102-279, 102d Cong., 2d Sess., 54 (1992).

Section 330 is designed to promote this system by "attract[ing] high caliber professionals to handle bankruptcy cases." George W. Kuney, *Hijacking Chapter 11*, 21 Emory Bankr. Dev. J. 19, 42 (2004). To that end, the Bankruptcy Reform Act of 1994 ensured that professional fees would be measured against "the customary compensation charged by comparably skilled practitioners in [non-bankruptcy] cases." 11 U.S.C. § 330(a)(3)(F). "[T]he mandate of 11 U.S.C. § 330(a) ... is an effort to ensure that bankruptcy specialists ... will not be required to accept fees in all of their cases that are consistently lower than fees they could receive elsewhere, thereby forcing them to forego the practice of bankruptcy law." Kuney, *supra*, at 42 (citation omitted). At base, vesting power in the bankruptcy courts to award professional fees follows from the premise that "[p]rofessionals render services that can add value and that can not be viewed only as an expense." Martin J. Bienenstock et al., *Response to "Routine Illegality in Bankruptcy Court, Big-Case Fee Practices"*, 83 Am. Bankr. L.J. 549, 571 (2009).

Diluting professional fees by rendering fee litigation uncompensable thus undercuts the very purpose of Section 330. Left unchecked, this sort of fee-dilution will invite the very problems Congress intended to curtail. "[I]f required to accept fees in all of their cases that are consistently lower than fees they could receive elsewhere," bankruptcy specialists "will not remain in the bankruptcy field." H.R. 95-595, 95th Cong., 1st Sess., 329-30 (1977). Alternatively, the bankruptcy system will start seeing rates rise across the board, as firms offset the risk of expensive fee litigation by passing on the costs to debtor estates. Pet. App. 18a n.7. Not only that, in all likelihood the hardest-hit firms will be the smaller ones, whose bread-and-butter work is modest

bankruptcy proceedings. The Fifth Circuit attached little importance to Baker Botts's $5 million loss, amounting as it did to "only about 4.4% of the entire fee." Pet. App. 19a. But for smaller, bankruptcy-specific firms, reductions are likely to be a much larger percentage of total revenue. Pet. 24. And by the same token, these smaller firms are much less able to absorb recurring losses. *Cf.* H.R. Rep. 95-595, 95th Cong, 1st Sess., 329-30 (1977) (suggesting that a "low fee in a small segment of a practice can be absorbed by other work").

The Fifth Circuit dismissed these ill-effects out of hand, viewing fee litigation as a normal cost of doing business. Pet. App. 17a. However, this position ignores the fact that "[b]ankruptcy professionals operate in an environment virtually unheard of in the legal profession as a whole." Comm. on the Judiciary, Hearing on Professional Fees in Bankruptcy (Mar. 24, 1992) (Testimony of I.W. Cohen). Their fees are "closely scrutinized by the Bankruptcy Court, the U.S. Trustee and other parties in interest," *id.*, and often a portion of the requested fees is held back until the conclusion of the bankruptcy case. For this reason, "many capable professionals decline to participate in bankruptcy cases because of the cumbersome, time consuming and expensive requirements of the fee review process which do not exist when dealing with private clients." Comm. on the Judiciary, Bankruptcy Judgeship Authorization and a General Overview of the Bankruptcy Code (May 16, 1991) (Testimony of R.E. Phelan). It is these precise challenges to bankruptcy practitioners that earned Congress's solicitude for professionals in the bankruptcy system.

B. Unless resolved, the Fifth Circuit's break with the majority view will invite satellite fee litigation in the other major bankruptcy jurisdictions.

As the only Circuit-court decision on the minority side of this issue, the Fifth Circuit's ruling creates uncertainty that will ultimately result in further litigation. "Uncertainty breeds litigation," *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 698 (1996) (Scalia, J., dissenting), and doubts about Section 330 will attract satellite fee disputes in the Circuits whose courts of appeals have yet to address this issue. Respondent casts this in a positive light, claiming that the question would benefit from "more percolation ... in the circuit courts." BIO 14. But after more than two decades of uncertainty, *see supra* 7, this Court's review is warranted to finally resolve the question presented. Even before the 1994 amendments to the Bankruptcy Code, commentators labeled professional-fee awards one of the most "publicly controversial" and least "consistently administered" areas in all of bankruptcy law. Warner, *supra*, at 1. That remains true today, and the level of appellate-court involvement is not a reliable barometer of the issue's recurring importance in day-to-day bankruptcy practice. *See* Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 Stan. L. Rev. 747, 787 (2010) ("Factors unique to bankruptcy litigation limit the ability of disputes to make their way to the courts of appeals."); *see also* Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. Rev. 384, 438-39 (2012).

Professional-fee issues are distinctive, moreover, in their potential for abuse. Fee objections have been called a "wonderful tactical measure," and with good reason. Brenda Hacker Osborne, Note, *Attorneys' Fees in Chapter 11 Reorganizations: A Case for Modified Procedures*, 69 Ind. L.J. 581, 592 (1994). The threat of extended fee litigation can strong-arm counsel into accepting lower compensation, *Boyd*, 404 B.R. at 483, or even bring pressure to bear on the litigation decisions of debtors' estates, *see* Comm. on the Judiciary, Hearing on Professional Fees in Bankruptcy (Mar. 24, 1992) (Testimony of K. Shapiro). Unless corrected, the current state of affairs has the potential to impair both the vitality of the bankruptcy bar and the soundness of our bankruptcy system more broadly.

C. The U.S. Trustee Program's guidelines underscore the courts' division on compensation for fee defense and the need for review by this Court.

The courts' disarray over compensation for fee litigation is actually memorialized in the Federal Register, in the U.S. Trustee Program's fee guidelines. The U.S. Trustee Program is an agency of the Department of Justice, charged with "supervis[ing] the administration of cases and trustees in cases under chapter 7, 11, 12, 13 or 15 of title 11 ... ." 28 U.S.C. § 586(a)(3). Its role in bankruptcy proceedings is considerable, especially when it comes to fee applications. In the run-up to the 1994 amendments, for example, the American Bankruptcy Institute remarked that the U.S. Trustee Program "tak[es] a very active role in the professional compensation arena." Warner, *supra*, at 63. That reputation persists; in 2011, for example,

bankruptcy scholar Stephen J. Lubben remarked on the U.S. Trustee Program's "long history" of "sweat[ing] the small stuff" in major Chapter 11 cases. Stephen J. Lubben, *The Clash Over Bankruptcy Fees*, N.Y. Times (Feb. 4, 2011).

Among each U.S. Trustee's duties is "reviewing, in accordance with procedural guidelines adopted by the Executive Office of the United States Trustee ... , applications filed for compensation and reimbursement under section 330 of title 11." 28 U.S.C. § 586(a)(3)(A). The purpose of this mandate is to harmonize fee awards nationwide; Congress explicitly charged the U.S. Trustees with applying the guidelines "uniformly" unless particular "circumstances warrant different treatment." *Id.*

When it comes to compensation for fee defense, though, the U.S. Trustee Program has recognized that uniformity does not exist. In its recent *Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under United States Code by Attorneys in Larger Chapter 11 Cases*, the U.S. Trustee Program acknowledged that the idiosyncrasies of each judicial district will dictate how U.S. Trustees apply the *Guidelines*. *See* 78 Fed. Reg. 36250 (June 17, 2013). Although the *Guidelines* at one point appear to frown on compensation for fee litigation as "generally inappropriate," *id.* 36250, the U.S. Trustee Program nonetheless announced in the comments to the *Guidelines* that it "follows the bankruptcy court's decision in *In re Motors Liquidation Co.*," *id.* 36275—a decision that joined the majority of courts in "authoriz[ing] payment of the costs of defending against [an] objection if the fee applicant substantially prevails." Bench Decision, No. 09-

50026, at 2 (Bankr. S.D.N.Y. Nov. 23, 2010). Ultimately, the U.S. Trustee Program advises that it may object to compensation for fee-related work "unless those activities fall within a judicial exception applicable within the district (such as litigating an objection to the application where the applicant substantially prevails)." 78 Fed. Reg. 36250.

The *Guidelines* thus highlight the confusion that has followed from Petitioners' question presented. In the District of Montana, for example, the U.S. Trustee is unlikely to object when a professional seeks compensation for defending fee applications. *In re Smith*, 317 F.3d 918 (9th Cir. 2002). In Mississippi districts, however, objections may be common. Pet. App. 1a-21a. And in districts like the Southern District of New York and the Eastern District of Michigan—home to intra-district conflicts—the U.S. Trustee's position is currently unknown. *See* Pet. App. 167a-171a. These are not the "uniform Laws on the subject of Bankruptcies" contemplated by the Constitution. U.S. Const. art. I, § 8, cl. 4. The U.S. Trustee Program's *Guidelines* thus only underscore the need for this Court's review.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

BAKER BOTTS L.L.P. AND JORDAN, HYDEN, WOMBLE, CULBRETH & HOLZER P.C., PETITIONERS

v.

ASARCO LLC

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE STATE BAR OF TEXAS BANKRUPTCY LAW SECTION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

Table of Authorities III

Interest of *Amicus Curiae* 1

Summary of Argument 3

Argument 4

A. A Circuit Split Exists Regarding Whether Bankruptcy Judges Are Authorized Under Bankruptcy Code § 330 to Exercise Discretion to Award Estate Professionals Compensation for Defense of Fee Applications 5

B. The Circuit Split Regarding Whether Estate Professionals May Be Compensated for the Defense of Fee Applications Creates Uncertainty for Estate Attorneys and Other Estate Professionals 13

1. The Circuit Split Creates Uncertainty and Geographic Disparity Regarding Attorney Fee Arrangements 13

2. The Circuit Split Creates Uncertainty and Constraints on Forum Choice and the Prevalence of Bankruptcy Practice in Many Forums 15

3. The Uncertainty Created By the Circuit Split Is Substantial and National in Scope 16

4. The Legislative History of § 330 Supports Uniform National Treatment of This Issue 18

5. The Issue Is of National Importance to All Estate Professionals, Not Only Attorneys 19

Conclusion 20

TABLE OF AUTHORITIES

Page(s)

Cases

Grant v. *George Schumann Tire & Batt. Co.*,
908 F.2d 874 (11th Cir. 1990) 9

In re Consolidated Bancshares, Inc.,
785 F.2d 1249 (5th Cir. 1986) 11

In re NuCorp Energy, Inc.,
764 F.2d 655 (9th Cir. 1985) 11, 12

In re Woerner,
__ F.3d __, 2014 WL 3443653 (5th Cir. July 15, 2014) 9

Matter of Pro-Snax Distributors, Inc.,
157 F.3d 414 (5th Cir. 1998) 8, 9

Smith v. *Edwards & Hale, Ltd. (In re Smith)*,
317 F.3d 918 (9th Cir. 2002) 8, 9, 11, 12

Statutes

11 U.S.C. § 1103 ..... 5, 19

11 U.S.C. § 327 ..... 5, 19

11 U.S.C. § 330 ..... *passim*

11 U.S.C. § 330(a) ..... *passim*

11 U.S.C. § 330(a)(1) 5, 7

11 U.S.C. § 330(a)(3) 6

11 U.S.C. § 330(a)(3)(C) 7, 9

11 U.S.C. § 330(a)(3)(F) 7

11 U.S.C. § 330(a)(4) 7, 9, 10

11 U.S.C. § 330(a)(4)(A) 6, 8

11 U.S.C. § 330(a)(6) 7, 8, 9, 11

11 U.S.C. § 332 ..... 5, 19

11 U.S.C. § 333 ..... 5, 19

Rules

Sup. Ct. R. 10(a) 4

Other Authorities

Collier on Bankruptcy (Alan Resnick & Henry J. Sommer eds., 16th ed.) 11

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H.R. Rep. No. 95-595, at 11 U.S.C. § 330 (1977) ... 18

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Richard E. Mikels and David Hadas, *Pro Hac Vice: Pro or Con?* (American Bankruptcy Institute, 2001) 14

State Bar of Texas Board of Directors Policy Manual 5 (Revised Jan. 2014)..... 1, 2

Stephen J. Lubben, Chapter 11 Professional Fee Study 35 (American Bankruptcy Institute, 2007)..... 18

TBLS Mission Statement, *available at* http://www.statebaroftexasbankruptcy.com 2

U.S. Bankruptcy Courts – Business and Nonbusiness Cases Commenced by Chapter of the Bankruptcy Code During the 12-Month Period Ending June 30, 2014, *available at* http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2014/0614_f2.pdf..... 16

INTEREST OF *AMICUS CURIAE*[1]

The State Bar of Texas was created to "provide specialized professional advice to those with the ultimate responsibility of governing the legal profession in serving the public" and has the stated mission to "support the administration of the legal system, assure all citizens equal access to justice, foster high standards of ethical conduct for lawyers, enable its members to better serve their clients and the public, educate the public about the rule of law and promote diversity in the administration of justice and the practice of law."[2] The State Bar of Texas authorizes and maintains various sections "for the purpose of promoting the objectives of the State Bar

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. The parties have all consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Neither this brief nor the decision to file it should be interpreted to reflect the view of any judicial member of TBLS. No judicial member of TBLS participated in the decision to file this brief, nor did any such member review it before filing (including Richard S. Schmidt, United States Bankruptcy Judge for the Southern District of Texas, who presided over the ASARCO LLC bankruptcy case). Counsel for petitioner Baker Botts L.L.P., Omar Alaniz, is Vice-President-Professional Education of TBLS, but he did not participate in the decision to file this brief or review it before filing.

[2] State Bar of Texas Board of Directors Policy Manual 5 (rev. Jan. 2014), *available at* http://goo.gl/tGH3Sa.

within the particular field designated by the bylaws of each section."[3]

Amicus curiae, the State Bar of Texas Bankruptcy Law Section (the "TBLS") is a section within the State Bar of Texas that was organized approximately ten years ago and currently has approximately 1,500 members who are attorneys licensed to practice law in the State of Texas.[4] TBLS has the stated purposes of (a) providing a platform for practitioners of bankruptcy law (wherever located) who are licensed to practice law in the State of Texas to exchange information and ideas on a regular basis and (b) providing opportunities for lawyers practicing bankruptcy law to attain and build upon the skills, experience, and relationships that will enhance the practice of bankruptcy law in the State of Texas.[5]

The petition presents the question whether 11 U.S.C. § 330(a) authorizes a bankruptcy judge, in an exercise of judicial discretion, to award compensation to a professional employed by a bankruptcy estate for the defense of the professional's fee application where a party in interest has objected to that fee application. The answer to this question directly affects the structuring of fee arrangements between attorneys and their clients, payments under which are subject to court approval in bankruptcy cases pursuant to 11 U.S.C. § 330. The Fifth Circuit

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[3] *Id.* at § 5.01.01.

[4] Membership in TBLS is also open to non-attorney members.

[5] See TBLS Mission Statement, *available at* http://www.statebaroftexasbankruptcy.com.

decision[6] below conflicts with the Ninth Circuit's position on this issue.

As a result of the circuit split, the compensation for attorneys and other professionals employed by debtors-in-possession or trustees in federal courts in bankruptcy matters is subject to different rules based on happenstance of geography, and, consequently, the ability of professionals to predictably and consistently structure fee arrangements with their multiple clients across various jurisdictions will be needlessly hindered, despite all such fee arrangements being governed by the same federal statute.

The inconsistent attorney compensation standards among the federal circuits directly affects the administration of bankruptcy cases and the employment of lawyers in such cases who are licensed to practice law in the State of Texas (many of whom practice in bankruptcy courts nationwide).[7] Accordingly, TBLS files this brief as *amicus curiae* to urge this Court to grant the petition and resolve the important and recurring question it presents.

SUMMARY OF ARGUMENT

TBLS files this brief to provide broader perspective about the practical uncertainty the Fifth Circuit's ruling injects into the administration of bankruptcy cases and the practice of bankruptcy law.

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[6] See Pet. App. 1a-21a. The decision is also reported at 751 F.3d 291.

[7] As discussed in more detail *infra*, while the case below involves *lawyer* compensation, the governing statute, § 330(a), applies to compensation of *all* estate professionals, including *non-lawyers*.

While TBLS takes no position at this time on the merits of the issue presented in the petition, TBLS files this brief in support of the petition because it is in the best interest of all estate professionals for the law regarding professional compensation to be consistent among the circuit courts of appeal. This Court should grant the petition in order to resolve the circuit split created by the Fifth Circuit's ruling and, thus, eliminate the practical strains on estate attorneys and other estate professionals resulting from inconsistent rulings among the circuits. The circuit split creates uncertainty and geographic disparity regarding attorney fee arrangements and also creates uncertainty and constraints on forum choice and the prevalence of bankruptcy practice in many forums. The uncertainty stemming from the circuit split is substantial and national in scope, and uniform national treatment of this issue is also supported by the legislative history of § 330. The petition should be granted in order to eliminate the tension the circuit split has created for all bankruptcy estate professionals.

ARGUMENT

Under this Court's Rule 10(a), the Fifth Circuit's holding and the conflict of authority with the Ninth Circuit are sufficient grounds to warrant granting certiorari. TBLS files this brief to underscore the far-reaching effects of practical importance of the conflict between the Fifth Circuit's ruling and Ninth Circuit precedent.

The split in the circuit courts of appeal regarding whether § 330(a) permits awards of fees for defense of fee applications imposes administrative and financial

burdens on professionals employed by debtors and trustees in bankruptcy cases. For the reasons discussed below, this Court should grant the petition in order to resolve the circuit split and eliminate the potentially far-reaching practical repercussions of the circuit split on bankruptcy law practitioners and other estate professionals.

A. A Circuit Split Exists Regarding Whether Bankruptcy Judges Are Authorized Under Bankruptcy Code § 330 to Exercise Discretion to Award Estate Professionals Compensation for Defense of Fee Applications

The Fifth Circuit's opinion below stands in conflict with established Ninth Circuit precedent. The statute at the heart of that conflict is 11 U.S.C. § 330(a), which governs the compensation of all professionals whose fees are paid by a bankruptcy estate. It provides in pertinent part:

> [T]he court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103 – (A) reasonable compensation for *actual, necessary services rendered* by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and (B) reimbursement for actual, necessary expenses.

11 U.S.C. § 330(a)(1) (emphasis added). Further:

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including – (A) the time spent on such services; (B) the rates charged for such services; *(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title*; (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and *(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.*

11 U.S.C. § 330(a)(3) (emphasis added). Additionally:

> * * * [T]he court shall not allow compensation for services that were not – (I) reasonably likely to benefit the debtor's estate; *or* (II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A) (emphasis added). And, finally:

> Any compensation awarded for the *preparation of* a fee application shall be based on the level

> and skill reasonably required to prepare the application.

11 U.S.C. § 330(a)(6) (emphasis added).

The conflict among the federal circuits stems from those courts' analysis of §§ 330(a)(1), (a)(3)(C), (a)(3)(F), (a)(4), and (a)(6). It is undisputed that § 330(a)(6) allows reasonable compensation for the *preparation of fee applications*. However, if an objection to a fee application is filed, and the applicant must then defend the application in court, there is now a split in circuit authority as to whether the time spent defending the application by preparing for and participating in litigation is compensable under an analysis of the relevant subsections of § 330(a). That analysis distills down to the following three questions:

> (a) whether defense of fee applications in bankruptcy cases constitutes "actual, necessary services," such that those services are compensable (§ 330(a)(1)), involving consideration of (i) whether the services were necessary to the administration of, or beneficial at the time rendered toward the completion of, a bankruptcy case (§ 330(a)(3)(C)) and (ii) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title (§ 330(a)(3)(F));
>
> (b) whether the defense of fee applications has a reasonable likelihood of benefitting the estate, *or* whether such defense is necessary to

the administration of the case (§ 330(a)(4)(A)); and

(c) whether the fact that § 330(a)(6) places certain limits on compensation for the *preparation* of fee applications affects whether fees for *defense* of fee applications that are objected-to by parties-in-interest are compensable.

The Fifth Circuit's analysis with respect to these questions below led it to conclude that fees for defense of fee applications are never to be authorized by bankruptcy courts under § 330(a), see Pet. App. 1a-21, while, conversely, the Ninth Circuit has concluded that fees for defense of fee applications may be authorized by bankruptcy courts in an exercise of judicial discretion under § 330(a). *Smith v. Edwards & Hale, Ltd. (In re Smith)*, 317 F.3d 918, 928-29 (9th Cir. 2002).

In the opinion below, citing to its prior decision in *Matter of Pro-Snax Distributors, Inc.*, 157 F.3d 414, 418 n.7 (5th Cir. 1998), the Fifth Circuit opened its analysis of the issue by focusing on whether the defense of fee applications brings a benefit "to the estate," and concluded that it does not, observing that, normally (but not in this case), creditors bear that cost. Pet. App. 15a.[8] The Fifth Circuit also

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[8] That the Fifth Circuit gravitated directly to the "benefit to the estate" inquiry is unsurprising in light of the Fifth Circuit's *Pro-Snax* opinion, cited in the opinion below, which established a heightened test regarding when professional fees are compensable under § 330 that requires a "stricter 'hindsight' or 'material benefit' measure" than is apparent from the plain language of § 330. See *Matter of Pro-Snax Distributors, Inc.*,

found support for its ruling in an Eleventh Circuit opinion, which found "absolutely no benefit to the estate, the creditors, or the debtor" with respect to appeals regarding an attorney's services rendered in administration of a bankruptcy estate. *Id.* (citing *Grant* v. *George Schumann Tire & Batt. Co.*, 908 F.2d 874, 882-83 (11th Cir. 1990)). The Fifth Circuit additionally determined that defense of fees litigation was different from and could not be fit into the "preparation" of fee applications covered by § 330(a)(6) and, further, that interpreting § 330(a)(3)(C) to authorize "compensation for professional fee applications" would render § 330(a)(6) superfluous.[9]

The Fifth Circuit next continued its focus on the "benefit to the estate" analysis by contrasting the Ninth Circuit's opinion in *In re Smith*, explaining that *Smith* "actually demonstrates the tension in applying the test of reasonableness and necessity *to*

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157 F.3d at 426. The *Pro-Snax* test is the prevailing standard in the Fifth Circuit; but application of that stricter test has been controversial, as evidenced in a recent Fifth Circuit decision:

> [A]ny argument that *Pro-Snax* was wrongly decided is irrelevant to the key question before us: whether the bankruptcy court erred by applying the wrong standard. Just as the district court said, whether "*Pro-Snax* was a wrongly decided, errant opinion * * * is an argument properly addressed to higher tribunals," but *Pro-Snax* is still the governing standard [in the Fifth Circuit].

In re Woerner, __ F.3d __, No. 13-50075, 2014 WL 3443653, at *7 (5th Cir. July 15, 2014).

[9] As noted by respondent in its brief in opposition, the Fifth Circuit's discussion of § 330(a)(6) appears to contain a typographical error as it references § 330(a)(4) rather than § 330(a)(6). See Resp. Br. 6 n.2; see also Pet. App. 16a.

the debtor's estate when it comes to litigation over fee applications in bankruptcy." Pet. App. 16a. The court explained that in "ordinary cases," payments for professional fees detract from the recovery of unsecured creditors, and "almost everyone loses something," so, according to the Fifth Circuit, it follows that it is inappropriate to award fees for fee defense litigation under § 330(a) in all bankruptcy cases. *Id.* at 16a-17a.[10]

The Fifth Circuit also justified its denial of fees for fee defense under § 330(a)(4) by finding that a $5 million reduction in petitioners' fees (while seemingly "drastic" in "absolute terms") was not a substantial enough reduction in relative terms to render the fees paid to petitioners non-comparable to the compensation that would be paid to equally skilled practitioners in other areas of law. *Id.* at 18a-19a. In sum, the Fifth Circuit concluded that: "Section 330 is not fairly read to include 'fees for defense of fees' either as reasonable, necessary costs of case administration or to prevent the dilution of the professional firm's core fees." *Id.* at 20a.[11]

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[10] The court also hypothesized generally that professionals who properly submit detailed, itemized billing records in compliance with the Federal Rules of Bankruptcy Procedure "ordinarily" will face fewer fee challenges, and that any such satellite litigation that is instituted "ordinarily" will be less successful. See *id.* at 17a.

[11] The court also justified its ruling against awarding fees for defense of fees by citing the perceived frequent collusion in other cases between debtors' counsel and counsel for *official creditor committees* where those parties do not object to each other's fees in an effort to secure payment of fees for both. *Id.* (citing *In re Consolidated Bancshares, Inc.*, 785 F.2d 1249, 1255 (5th Cir.

The Ninth Circuit's *Smith* opinion is utterly at odds with the Fifth Circuit ruling. The Ninth Circuit began its analysis of the issue in *Smith* with § 330(a)(6), which sets forth parameters for compensation for the *preparation* (but not defense) of fee applications, but explained that nothing in § 330 forbids compensation for litigation in defense of fee applications if such compensation otherwise meets the requirements of § 330. *Smith*, 317 F.3d at 928. The Ninth Circuit's position in *Smith* as to fees for fee defense is consistent with prior Ninth Circuit precedent in *In re NuCorp Energy, Inc.*, 764 F.2d 655, 659 (9th Cir. 1985), which was the impetus for the legislative enactment of § 330(a)(6). See 3 Collier on Bankruptcy ¶ 330.03 [16][a][i] (Alan Resnick & Henry J. Sommer eds., 16th ed.) ("Section 330(a)(6), added to the [Bankruptcy] Code in 1994, represents a codification of *NuCorp* * * * "). In *NuCorp*, the Ninth Circuit ruled that professionals' costs to comply with fee *application* requirements in bankruptcy courts are necessarily compensable under § 330 because they are "actual and necessary services," and the court further explained, in dicta, that time spent *litigating* fee awards should also be compensable for the same reasons. See *NuCorp*, 764 F.2d at 658-62; *Smith*, 317 F.3d at 928.

In awarding fees for fee defense, the Ninth Circuit in *Smith* reasoned that failure to award fees for

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1986)). But this rationale does not speak directly to the facts of this case in which the objections in the bankruptcy case below to petitioners' fee applications were initiated by the *parent company of petitioners' client* (after petitioners secured, for the benefit of the estate, a fraudulent transfer judgment valued at $7 to $10 billion against that parent company).

successful defenses to fee challenges would unfairly dilute fee awards, thereby reducing the "effective compensation of bankruptcy attorneys to levels below the compensation available to attorneys generally." *Id.* Where the professionals in *Smith* successfully defended their fee awards, the court concluded that refusing to compensate them for defending those fees would dilute their compensation for "actual and necessary services" provided and would "encourage debtors to file meritless objections to fee applications." *Id.* at 929. The court also found the fees for defense of fees to be necessary for administration of the case and that they provided a benefit to the estate in determining the amount of administrative fees owed by the estate. *Id.*[12]

It is clear from the comparison of the two circuit decisions that the circuits are in conflict, and this Court should grant the petition to resolve the conflict.

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[12] The rationale in *Smith* for awarding fees for defense of fees is in direct alignment with the rationale espoused in *NuCorp*, which articulated that its ruling is consistent with the legislative intent behind § 330 of ensuring (a) compensation for bankruptcy attorneys commensurate with that earned by attorneys in non-bankruptcy cases and (b) the repudiation of judicial decisions which had held that compensation of attorneys in bankruptcy proceedings were to be subject to the overriding concern of preserving the estate. See *id.* at 928; *NuCorp*, 764 F.2d at 658-62.

B. The Circuit Split Regarding Whether Estate Professionals May Be Compensated for the Defense of Fee Applications Creates Uncertainty for Estate Attorneys and Other Estate Professionals

1. The Circuit Split Creates Uncertainty and Geographic Disparity Regarding Attorney Fee Arrangements

The Fifth Circuit's decision below that professionals can never be compensated under § 330(a) for defending their fee applications in bankruptcy cases creates uncertainty and inconsistency in the national practice of bankruptcy law. This uncertainty is apparent in the acknowledgement by the Fifth Circuit below that: "When firms become aware that they may not be reimbursed for defending core fee applications [in the Fifth Circuit], they can anticipate this possibility in their hourly rates and by thoroughly documenting fee applications." Pet. App. 18a n.7.[13] Here, the Fifth

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[13] This notion of factoring defense fees into rates charged in bankruptcy matters was raised by the American Bankruptcy Institute ("ABI") in a report on professional compensation published in 1991 (the "Report"), which noted that the survey data from judges and lawyers "suggest that professionals have not adjusted their hourly rates in those districts where no such compensation [for defense of fee applications] is available." G. RAY WARNER & KEITH J. SHAPIRO, AMERICAN BANKRUPTCY INSTITUTE NATIONAL REPORT ON PROFESSIONAL COMPENSATION IN BANKRUPTCY CASES, 61 & n.49 (LRP Publications, 1991), *available at* http://goo.gl/Eqryym. In the Report, which reflects the most recent relevant data gathered on this issue, the ABI admits that: "One might expect that professionals who do not generally receive compensation for the time spent preparing *and presenting* fee application[s] might adjust their hourly rates

Circuit suggested that its ruling should lead practitioners to conclude that they ought to inflate their fees, subject to approval under *federal law*, in such a way as to build in compensation for possible later dilution of fees (at least in the Fifth Circuit) resulting from their potential defense of fee applications. But those same practitioners, who are also frequently employed by trustees and debtors-in-possession in cases filed in *non*-Fifth Circuit courts, would not need to likewise modify their fee arrangements with clients in their non-Fifth Circuit cases to account for the possibility of fee defense. Countless professionals will confront the conflicting compensation scenarios in the various circuits as the practice of bankruptcy law is increasingly nationalized and not limited by state or circuit borders.[14] Moreover, attorneys who practice in courts

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upward to recover this cost. The survey data, however, do not indicate that lawyers have responded in this fashion." *Id.* at 198 (emphasis added), *available at* http://goo.gl/5uPpQM.

[14] See, e.g., Daniel Pouladian & Leslie Reed, *"You Are Now Free to Move About the Country:" Why Bankruptcy Lawyers Should Be Free to Engage in Multijurisdictional Practice*, 52 U.C.L.A. L. Rev. 937, 977 (2004-05) (explaining that "bankruptcy practice is more national than ever before – indeed, it is now global"); Richard E. Mikels & David Hadas, *Pro Hac Vice: Pro or Con?* (American Bankruptcy Institute, 2001), *available at* http://goo.gl/emW5OR (referencing the "increasing nationalization of bankruptcy practice" and the "ever-increasing multi-jurisdictional aspect to bankruptcy practice"). Indeed, it is common practice for bankruptcy attorneys to use the admission *pro hac vice* procedure to appear in bankruptcy courts across the country where they are not already admitted, and such admission is governed by local rules adopted by nearly all bankruptcy courts. *Id.* & n.3 (explaining that "local rules adopted by bankruptcy courts largely govern this practice" and

in the Fifth Circuit will be subject to fee structuring requirements as a result of the decision below not applicable to other bankruptcy attorneys practicing in other jurisdictions.

2. *The Circuit Split Creates Uncertainty and Constraints on Forum Choice and the Prevalence of Bankruptcy Practice in Many Forums*

It is easy to conceive that clients of attorneys with such a national practice may be incentivized to direct their counsel, wherever possible, to file bankruptcy cases on their behalf in courts with proper venue outside of the Fifth Circuit rather than inside it in order to avoid a higher fee structure accounting for potential fee defense costs and to provide certainty of bargained-for compensation. With respect to cases filed in the Fifth Circuit, professionals now will be compelled to strike a harder fee bargain in order to maintain the potential to earn the same effective rate of compensation to which they would be otherwise entitled in other jurisdictions. Or, the inverse scenario may occur – clients may require counsel to file cases in the Fifth Circuit, even if alternative venues are available, while refusing to agree to protective provisions for the professionals' potential defense of fees in such cases. In the absence of an alternative venue outside the Fifth Circuit, or in the face of clients refusing to agree in advance to pay rates that account for possible dilution of professional fees in the Fifth Circuit, counsel doing work in the

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noting that "the vast majority of bankruptcy courts" provide local rules allowing for non-resident practitioners to seek admission *pro hac vice*).

Fifth Circuit may be disadvantaged compared to counsel in other circuits. Or, as a result of fee differential in the Fifth Circuit, counsel may simply refuse to represent clients in bankruptcy cases that must be filed in that jurisdiction.

Under any of these scenarios, it is easy to see that the circuit split on the issue presented in the petition may substantially affect bankruptcy practice and bankruptcy attorney compensation and encourage forum shopping. Certainly, the venue of bankruptcy cases should not turn on issues relating to the employment and compensation of professionals, but the circuit split injects these issues into the venue decision.

3. The Uncertainty Created By the Circuit Split Is Substantial and National in Scope

The effect of the ruling below on the administration of bankruptcy cases and the employment of professionals is substantial and far-reaching. During the twelve-month period ending June 30, 2014 alone, over one million bankruptcy cases were filed across the United States.[15] The Fifth and Ninth Circuits account for approximately one quarter of all bankruptcy filings nationally; if the Eleventh Circuit is included in the split, the figure climbs to forty percent.[16] And now that there is a circuit split as to whether § 330 allows for awards for

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[15] See U.S. Bankruptcy Courts – Business and Nonbusiness Cases Commenced by Chapter of the Bankruptcy Code During the 12-Month Period Ending June 30, 2014, *available at* http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2014/0614_f2.pdf.

[16] See *id.*; see also Resp. Br. 14 (supporting 40% figure).

the defense of fees, it will be increasingly difficult for practitioners to know how to structure fee arrangements in the other circuits where sixty to seventy-five percent of bankruptcy cases are filed, as it will be impossible to anticipate with which circuit's precedent these other circuits will side. A consistent rule is needed. Moreover, although the rule prevailing prior to *ASARCO* was that fees for fee defense *were* available at the discretion of bankruptcy judges,[17] in light of the Fifth Circuit's decision, trustees, debtors, and reorganized debtors will have new incentives to challenge the fees of estate professionals in order to effectively reduce the net fees they must pay to estate professionals, which will likely increase fee litigation.[18] In a nationwide

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[17] See Pet. Br. 167a-171a.

[18] Until now, most defense fee requests were likely to be decided in unreported orders of various bankruptcy courts in light of the fact that previously no circuit split on this issue under the current version of § 330 existed, and bankruptcy courts had no incentive to report opinions on the heretofore-largely uncontroversial issue of defense fees. But this practice will likely change with the added incentives to trustees, debtors, and reorganized debtors to challenge estate professional fees in order to reduce fees payable by the estate because such costs would be absorbed by the estate professionals under the Fifth Circuit rule. Moreover, the fees of estate professionals are frequently litigated. According to a 2005 ABI study, in chapter 11 cases alone, based on data from 2004, in approximately 10% of cases, parties objected to the lead debtor's counsel's fees, and in large chapter 11 cases, that percentage swelled to almost 20%. See PRESENTATION OF THE LANDMARK ABI FEE STUDY: CONCLUSIONS AND RAMIFICATIONS 8, ¶¶ 15-16 (American Bankruptcy Institute, Winter Leadership Conference 2007, *available at* http://goo.gl/zZltxr; STEPHEN J. LUBBEN (REPORTER), CHAPTER 11 PROFESSIONAL FEE STUDY 35 (American Bankruptcy

practice like bankruptcy, such uncertainty and potential gamesmanship based on mere geography should not be permitted.

The Court should grant the petition now in order to prevent a waste of judicial, professional, and bankruptcy estate resources that will occur where, because of the circuit split, (1) estate professionals will increasingly encounter objections to their fees asserted purely for the sake of reducing the net fees owed to such professionals (which will increase costs either to estates or estate professionals), and (2) parties will be forced to keep litigating the issue presented by the petition in the face of conflicting circuit authority and the absence of clear Supreme Court guidance.

4. The Legislative History of § 330 Supports Uniform National Treatment of This Issue

The legislative policy behind 11 U.S.C. § 330 also supports uniform national treatment of this issue. As recognized in the legislative history to § 330, if bankruptcy specialists are required to accept fees in all their cases that are consistently lower than fees they would receive elsewhere, they "will not remain in the bankruptcy field."[19] Moreover, if bankruptcy

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Institute, 2007). With changed incentives under the Fifth Circuit rule, the objection statistics are likely to rise.

[19] See H.R. Rep. No. 95-595, at 330 (1977) (explaining that § 330 is intended to incentivize "bankruptcy specialists, who enable the system to operate smoothly, efficiently, and expeditiously" to keep practicing law in the "bankruptcy arena" in order to prevent the field from being occupied only by attorneys who could not find other work or who practice bankruptcy law occasionally "almost as a public service").

specialists are required to accept fees in their cases that are lower than they would receive (or are forced to bargain for financial protections in the face of fee dilution) in some jurisdictions but not others, they will be compensated differently circuit-by-circuit for work performed in what would otherwise be a nationwide practice, or, worse, incentivized to refuse to practice bankruptcy law in jurisdictions that are perceived to impede their practice and compensation. Where one jurisdiction imposes the cost of defense of fee applications as a non-compensable cost of doing business but other jurisdictions do not, such disparity in the rules regarding compensation of estate professionals will be felt throughout the nationwide practice of bankruptcy law.

5. *The Issue Is of National Importance to All Estate Professionals, Not Only Attorneys*

Not only does the decision below affect the petitioners and other bankruptcy lawyers, as the Fifth Circuit itself explicitly acknowledged, it affects *all* professionals a bankruptcy estate employs: "The issues presented transcend debtor's counsel, because Section 330(a) governs compensation of *all professionals* whose fees are paid by the bankruptcy estate" including "a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103," including any "attorney" and "any paraprofessional person employed by any such person * * * " Pet. App. 14a & n.6 (emphasis added). Accordingly, not only will the employment and compensation of attorneys in bankruptcy cases be

affected, but, so, too, will the employment and compensation of other estate professionals who fall within the scope of § 330, causing the ripple effects of the circuit split to be felt by many types of professionals, including accountants, appraisers, financial advisors, sale advisors, and experts engaged by bankruptcy estates. The decision below warrants review because it is of consequence to all estate professionals across the nation.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted.

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IN THE

Supreme Court of the United States

BAKER BOTTS L.L.P. AND JORDAN, HYDEN, WOMBLE, CULBRETH & HOLZER, P.C.,
Petitioners,

v.

ASARCO LLC,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED

Whether 11 U.S.C. §330(a) grants bankruptcy judges discretion to award compensation for the defense of a fee application.

PARTIES TO THE PROCEEDINGS BELOW

Baker Botts L.L.P. and Jordan, Hyden, Womble, Culbreth & Holzer, P.C. were the fee applicants in the bankruptcy court, the appellees in district court, and the appellees in the court of appeals.

ASARCO LLC was the debtor in the bankruptcy court, the appellant in the district court, and the appellant in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Petitioner Baker Botts L.L.P. states that it is a limited liability partnership, which has no parent company. Petitioner Jordan, Hyden, Womble, Culbreth & Holzer, P.C. states that it is a professional corporation, which has no parent company, and no publicly held company owns 10%.

Respondent ASARCO LLC is wholly owned, directly or indirectly, by Americas Mining Corporation, which in turn is wholly owned by Grupo Mexico, which is publicly traded in Mexico.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceedings Below	ii
Corporate Disclosure Statement	iii
Opinions Below	1
Statement of Jurisdiction	1
Statute Involved	2
Preliminary Statement	4
Statement	6
I. Background	6
A. The statutory framework	6
B. From "rags to riches": the "most successful Chapter 11" case in history	8
C. Reorganized ASARCO's fee attack	9
II. Proceedings Below	12
A. Proceedings in the bankruptcy court	12
B. Proceedings in the district court and on remand	13
C. The court of appeals' decision	14
Summary of Argument	17
Argument	20
I. Section 330(a) Grants Bankruptcy Judges Discretion To Award Fees For Successfully Defending Fee Applications	20
A. Section 330(a)'s text and structure authorize the award of defense fees	20

TABLE OF CONTENTS—Continued

Page

1. Congress framed the compensation system around a broad grant of discretion 21
2. The statutory factors support discretion to award defense compensation 23
   a. Successful fee defense is "necessary" to bankruptcy "cases" 23
   b. The discretion to award defense fees is indispensable for compensation parity 27
   c. Courts' discretion is further constrained only in one context—fee-application preparation 30
3. Congress addressed what services are categorically non-compensable, and did not exclude fee defense 32

B. Section 330(a)'s history reflects Congress's purpose of ensuring full compensation to bankruptcy lawyers, including defense fees 34
   1. The Bankruptcy Code replaced the "economy of the estate" approach with a parity requirement 34
   2. Congress repudiated lingering economy-of-the-estate rulings in its 1994 amendments 36

TABLE OF CONTENTS—Continued

Page

3. The Fifth Circuit's categorical defense-fee prohibition contravenes Congress's purpose 39

C. The Fifth Circuit erroneously applied the American Rule, despite unbroken precedent allowing defense fees under other "reasonable compensation" statutes 39

1. Statutes using language like § 330(a)'s displace the American Rule and authorize defense fees 40

2. Absent express preclusion, defense fees are part of a general grant of discretion 42

3. Defense fees in other contexts seek to avoid fee dilution—a central objective of § 330(a)..... 44

D. Courts have found no difficulty in awarding (or denying) defense fees..... 46

II. The Judgment Below Thwarts The Sound Functioning Of The Bankruptcy System 47

A. Discretion to award defense fees prevents systemic harms 48

B. Discretion to award defense fees aligns the parties' incentives appropriately..... 51

Conclusion 57

TABLE OF AUTHORITIES

Page

CASES

Alyeska Pipeline Serv. Co. v. *Wilderness Soc'y*,
421 U.S. 240 (1975) 40

Angela L. v. *Pasadena Indep. Sch. Dist.*,
918 F.2d 1188 (5th Cir. 1990) 42

Blum v. *Stenson*,
465 U.S. 886 (1984) 46

Boyd v. *Engman*,
404 B.R. 467 (W.D. Mich. 2009) 26

Christiansburg Garment Co. v. *EEOC*,
434 U.S. 412 (1978) 53, 56

Commissioner, INS v. *Jean*,
496 U.S. 154 (1990) 22, 23, 32, 41, 43, 44, 55, 56

Fogerty v. *Fantasy, Inc.*,
510 U.S. 517 (1994) 21

Frazin v. *Haynes & Boone LLP (In re Frazin)*,
413 B.R. 378 (Bankr. N.D.Tex. 2009) 47

Gagne v. *Maher*,
594 F.2d 336 (2d Cir. 1979) 23, 44, 45

Gagnon v. *United Technisource, Inc.*,
607 F.3d 1036 (5th Cir. 2010) 42

Grant v. *George Schumann Tire & Batt. Co.*,
908 F.2d 874 (11th Cir. 1990) 16, 24, 49

Hairston v. *R&R Apartments*,
510 F.2d 1090 (7th Cir. 1975) 45

Hernandez v. *Kalinowski*,
146 F.3d 196 (3d Cir. 1998) 42

TABLE OF AUTHORITIES—Continued

Page

In re Beverly Crest Convalescent Hosp., Inc.,
548 F.2d 817 (9th Cir. 1976) 34

In re Erewhon, Inc.,
21 B.R. 79 (Bankr. D. Mass. 1982) 46

In re First State Bancorp.,
No. 7-11-11916-JA, 2014 WL 1203141
(Bankr. D.N.M. Mar. 24, 2014) 26

In re LaFrance,
311 B.R. 1 (Bankr. D. Mass. 2004) 28

In re Lang,
127 F. 755 (W.D. Tex. 1904) 34

In re Nucorp Energy, Inc.,
764 F.2d 655 (9th Cir. 1985) 28, 54

In re Riverside-Linden Inv. Co.,
945 F.2d 320 (9th Cir. 1991) 46, 53

In re Smith,
317 F.3d 918 (9th Cir. 2002)
..... 15, 26, 29, 33, 50, 51, 53

In re St. Rita's Assocs. Private Placement, L.P.,
260 B.R. 650 (Bankr. W.D.N.Y. 2001) 47

In re Teraforce Tech. Corp.,
347 B.R. 838 (Bankr. N.D. Tex. 2006) 41, 47

In re UNR Indus., Inc.,
986 F.2d 207 (7th Cir. 1993) 34, 36

In re Wind N' Wave,
509 F.3d 938 (9th Cir. 2007) 29, 42, 53

In re Worldwide Direct, Inc.,
334 B.R. 108 (D. Del. 2005) 26, 29, 45, 51, 52

TABLE OF AUTHORITIES—Continued

Page

J.R. Cousin Indus., Inc. v. *Menard, Inc.*,
127 F.3d 580 (7th Cir. 1997) 40

Jacobowitz v. *Double Seven Corp.*,
378 F.2d 405 (9th Cir. 1967) 34

Kinney v. *IBEW*,
939 F.2d 690 (9th Cir. 1991) 32, 42

Lamie v. *U.S. Trustee*,
540 U.S. 526 (2004) 15, 20, 47, 48, 54

Martin v. *Franklin Capital Corp.*,
546 U.S. 132 (2005) 21

NASCO v. *Chambers, Inc.*,
501 U.S. 32 (1991) 55

NLRB v. *Bildisco*,
465 U.S. 513 (1984) 48

Octane Fitness, LLC v. *Icon Health & Fitness, Inc.*,
134 S. Ct. 1749 (2014) 21, 22, 33, 43, 56, 57

Powell v. *C.I.R.*,
891 F.2d 1167 (5th Cir. 1990) 42

Prandini v. *Nat'l Tea Co.*,
585 F.2d 47 (3d Cir. 1978) 44

Setser v. *United States*,
132 S. Ct. 1463 (2012) 30

Souza v. *Southworth*,
564 F.2d 609 (1st Cir. 1977) 45

Student Pub. Interest Research Grp., Inc. of N. J. v. *Windall*,
51 F.3d 1179 (3d Cir. 1995) 42

Williams v. *Hanover Hous. Auth.*,
113 F.3d 1294 (1st Cir. 1997) 45, 46

TABLE OF AUTHORITIES—Continued

Page

STATUTES

11 U.S.C. § 327(a) 6
11 U.S.C. § 330(a) ..... *passim*
11 U.S.C. § 330(a)(1) 6, 7, 30, 32, 36, 40, 41, 45, 46
11 U.S.C. § 330(a)(1)(A) 4, 7, 17, 21, 22, 23, 24
11 U.S.C. § 330(a)(2) 7, 25, 28
11 U.S.C. § 330(a)(3) 7, 18, 22, 23, 30, 31, 38
11 U.S.C. § 330(a)(3)(A) 7, 23
11 U.S.C. § 330(a)(3)(B) 7, 23, 50
11 U.S.C. § 330(a)(3)(C) 7, 18, 23, 24, 25, 31, 33, 37, 53
11 U.S.C. § 330(a)(3)(D) 7, 23
11 U.S.C. § 330(a)(3)(E) 7
11 U.S.C. § 330(a)(3)(F) 7, 8, 18, 23, 27, 30, 36, 50
11 U.S.C. § 330(a)(4) 18, 21, 22, 25, 30, 31, 32, 33, 37, 38
11 U.S.C. § 330(a)(4)(A) 7, 32, 33
11 U.S.C. § 330(a)(4)(A)(i) 33
11 U.S.C. § 330(a)(4)(A)(ii) 33, 37, 53
11 U.S.C. § 330(a)(6) 7, 23, 30, 31, 32
11 U.S.C. § 331 6
11 U.S.C. § 503(b)(2) 6, 25, 26
11 U.S.C. § 507 49
11 U.S.C. §507(a)(2) 25, 26
11 U.S.C. § 1107(a) 6
20 U.S.C. § 1415(e)(4)(B) 42
26 U.S.C. § 7430(a)(2) 42

TABLE OF AUTHORITIES—Continued

Page

28 U.S.C. § 586(a)(3)(A) 11, 54
28 U.S.C. § 1254(1) 1
28 U.S.C. § 2412(d)(1)(A) 22, 43
29 U.S.C. § 216(b) 42
33 U.S.C. § 1365(d) 42
35 U.S.C. § 285 ..... 21, 22
42 U.S.C. § 1988 42
42 U.S.C. § 1997e(d)(1) 42
42 U.S.C. § 2000e-5(k) 42
42 U.S.C. § 3612(c) 42
Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994) 37

RULES

Fed. R. Bankr. P. 2016 ..... 6, 25, 27
Fed. R. Bankr. P. 9011 55
Fed. R. Civ. P. 11 55

LEGISLATIVE HISTORY

124 Cong. Rec. 32,394 (1978) 35, 36
124 Cong. Rec. 33,994 (1978) 35
H.R. Rep. No. 95-595 (1977) 8, 35, 48
S. Rep. No. 102-279 (1992) 37, 38
S. Rep. No. 103-168 (1993) 31

TABLE OF AUTHORITIES—Continued

Page

ADMINISTRATIVE MATERIALS

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IN THE

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BAKER BOTTS L.L.P. AND JORDAN, HYDEN, WOMBLE, CULBRETH & HOLZER, P.C.,
Petitioners,

v.

ASARCO LLC,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR PETITIONERS

Petitioners Baker Botts L.L.P. and Jordan, Hyden, Womble, Culbreth & Holzer, P.C., respectfully request that this Court reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a-21a) is reported at 751 F.3d 291. The district court's opinion (Pet. App. 22a-54a) is reported at 477 B.R. 661. The bankruptcy court's opinion (Pet. App. 55a-146a) is unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was filed on April 30, 2014. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

11 U.S.C. § 330(a) provides:

(a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103—

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

(2) The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested.

(3) In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

(4)(A) Except as provided in subparagraph (B), the court shall not allow compensation for—

(i) unnecessary duplication of services; or

(ii) services that were not—

(I) reasonably likely to benefit the debtor's estate; or

(II) necessary to the administration of the case.

(B) In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.

(5) The court shall reduce the amount of compensation awarded under this section by the amount of any interim compensation awarded under section 331, and, if the amount of such interim compensation exceeds the amount of compensation awarded under this section, may order the return of the excess to the estate.

(6) Any compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application.

(7) In determining the amount of reasonable compensation to be awarded to a trustee, the court shall treat such compensation as a commission, based on section 326.

PRELIMINARY STATEMENT

The Bankruptcy Code provides that bankruptcy judges "may award" "reasonable compensation" to attorneys and other professionals who work on behalf of an estate. 11 U.S.C. § 330(a)(1)(A). This core authorization replicates that of fee statutes in other contexts, where the word "may" conveys a broad grant of discretion, subject only to statutory limitations. For bankruptcy cases, the flexible fee process ensures the achievement of broader bankruptcy goals by including:

- **Parity.** Congress adopted the principle of "parity," under which bankruptcy professionals' compensation may not be diminished compared to practitioners in other areas of law—a major departure from the pre-Code "economy of the estate" standard that deliberately undercompensated bankruptcy professionals relative to their peers.
- **Scrutiny.** Unlike their non-bankruptcy peers, bankruptcy professionals must submit detailed fee applications, which any interested party, including the U.S. Trustee or the court, may challenge—even though those parties were not the professionals' client. This deters waste and advances transparency. Because the Code demands fee applications, the costs of preparing and litigating them are compensable; otherwise, core compensation would inevitably be diluted, contravening the principle of parity.
- **Discretion.** The bankruptcy court, after evaluating the application and any objections, has broad discretion to award "reasonable compensation," thereby using the complex process to achieve just results.

This balance encourages highly qualified counsel to accept bankruptcy assignments, a chief legislative goal; counsel know that their compensation will not be diluted simply because they worked in bankruptcy. Rigorous

fee-application scrutiny deters improper or inflated billing. The bankruptcy judge's independent discretion ensures fees that are justified and record-based.

The judgment below destabilizes that system. A party—the debtor's parent company previously defeated in fraudulent-transfer litigation by the professionals—challenged a fee application without justification or merit, yet succeeded in imposing massive defense costs on the professionals. The Fifth Circuit held that those professionals must themselves shoulder the entire expense of successfully defending the fee application. This corrodes the parity principle that Congress has repeatedly endorsed; it also encourages meritless objections that serve only to inflict heavy costs on adversaries. If agenda-pushing non-clients can unilaterally (and with little cost to themselves) reduce the compensation of targeted professionals, those professionals will *always* see their compensation lag behind that of their non-bankruptcy peers.

No case could better illustrate the inequity of the Fifth Circuit's holding. This was—that court readily agreed—one of the largest and most successful Chapter 11 bankruptcies in history. Creditors were fully paid. But ASARCO is now controlled by a parent company that defrauded ASARCO and that bitterly but unsuccessfully fought the exposure of that fraud by ASARCO's bankruptcy counsel, Baker Botts. Exacting revenge, once the parent regained control of ASARCO through the successful reorganization, it attacked all of Baker Botts' fees with such a barrage of objections that petitioners were forced to spend over $5 million solely to defend their core-fee applications. Ultimately, *every single objection* to the core fees was overruled. ASARCO tellingly pursued *none* of them on appeal. The bankruptcy court awarded Baker Botts compensation for its heavy defense costs, *none* of which would be borne by creditors. The district court affirmed, but the Fifth Circuit, while commending the work

performed, reversed solely because it believed that § 330(a) precludes such awards as a matter of law.

The judgment below is a serious outlier, both in this specific context and with respect to this Court's approach to fee awards generally. It should be reversed.

STATEMENT

I. BACKGROUND

A. The statutory framework

A debtor-in-possession in a Chapter 11 bankruptcy, "with the court's approval, may employ one or more attorneys * * * to represent [it] in carrying out [its] duties under this title." 11 U.S.C. §§ 327(a), 1107(a).[1] Section 330(a) of the Bankruptcy Code gives bankruptcy courts discretion to award such attorneys and other professionals "reasonable compensation" from the estate. Professional compensation under § 330(a) is an "administrative expens[e]" of the estate that must be determined before the bankruptcy case can be closed and creditors' rights enforced. § 503(b)(2).

A professional seeking compensation must file a fee application that includes "a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested." Fed. R. Bankr. P. 2016.[2] Throughout the bankruptcy, professionals may periodically apply for interim compensation, which the court may grant after notice and a hearing applying the § 330(a) standards. See § 331. But notwithstanding any interim compensation awards, professionals' total compensation must be finally approved before the close of the bankruptcy case. § 330(a)(1). Final compensation like-

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[1] Unless otherwise indicated, statutory citations refer to the Bankruptcy Code, Title 11 of the U.S. Code.

[2] References to "compensation" and "defense fees" include fee compensation and expense reimbursement, which are both involved here.

wise requires "notice to the parties in interest and the United States Trustee and a hearing," *ibid.*, and the court may award "less than the amount of compensation that is requested" upon the objection of any interested party, the Trustee, or the court itself, § 330(a)(2).

Section 330(a) guides the bankruptcy court's determination of what services are compensable. Rather than list compensable tasks, § 330(a) broadly authorizes courts to award "reasonable compensation for actual, necessary services rendered." § 330(a)(1)(A). The statute enunciates only two prohibitions on compensation: for (1) "unnecessary duplication of services" and (2) services that were neither "reasonably likely to benefit the debtor's estate" nor "necessary to the administration of the case." § 330(a)(4)(A).

Section 330(a) also guides bankruptcy courts "[i]n determining the amount of reasonable compensation to be awarded." § 330(a)(3). The statute includes a targeted method of assessing compensation for only one service, "the preparation of a fee application," which must be based "on the level and skill reasonably required to prepare the application." § 330(a)(6). For everything else, bankruptcy judges must evaluate "the nature, the extent, and the value of such services, taking into account all relevant factors," § 330(a)(3), including six that are express, such as the "rates charged" and whether the "time spent" on a service was reasonably commensurate with the nature of the task. § 330(a)(3)(A)-(F). Of particular relevance here, courts must consider whether services were "necessary to the administration of, or beneficial * * * toward the completion of, a case under this title." § 330(a)(3)(C).

Also among the enumerated factors courts "shall consider" is "whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this

title." § 330(a)(3)(F). Compensation parity between bankruptcy and non-bankruptcy attorneys was a central objective of the Bankruptcy Code of 1978. In enacting the Code, Congress repudiated the old "economy of the estate" policy. See H.R. Rep. No. 95-595, at 330 (1977). "Bankruptcy specialists," it recognized, "if required to accept fees in all of their cases that are consistently lower than fees they could receive elsewhere, will not remain in the bankruptcy field." *Ibid.*

B. From "rags to riches": the "most successful Chapter 11" case in history

For 52 months, Baker Botts navigated ASARCO LLC, the debtor-in-possession, through one of the most complex—and most successful—Chapter 11 bankruptcy cases in American history. When the enormous copper mining, smelting, and refining company entered bankruptcy in 2005, its chances of reorganization were "slim." Pet. App. 62a. ASARCO "had essentially run out of cash," and it faced over $10 billion in asbestos, environmental, and toxic-tort liability. *Id.* at 63a. It was, in the Department of Justice's words, "the largest environmental bankruptcy in U.S. history." *Id.* at 65a. Worsening ASARCO's financial distress were serious corporate-governance and tax problems, a striking workforce, and in particular, its litigious parent company, Americas Mining Corporation. *Id.* at 62a-66a. Just two years before the bankruptcy, the parent had directed ASARCO to transfer its controlling ownership interest in Southern Copper Corporation (SCC) to the parent, "add[ing] insurmountable momentum to ASARCO's spiral into bankruptcy." *Id.* at 68a. Consequently, there was a "significant possibility" that ASARCO would be forced to liquidate, and "[c]reditors were expected to receive cents on the dollar"—"if anything." *Id.* at 63a.

The outcome of the bankruptcy case, however, was "nothing short of extraordinary." Pet. App. 62a. Credi-

tors received *full* payment of all claims, totaling $3.56 billion. *Id.* at 62a, 70a, 84a. Moreover, even after accounting for attorneys' fees, the Plan Administrator *refunded* approximately $70 million to ASARCO at the completion of the bankruptcy. *Id.* at 84a. Baker Botts' efforts transformed "ASARCO * * * from a broke and broken company to a reorganized ASARCO, cleansed of its historical liabilities and well-positioned to compete effectively in the world of commerce." *Id.* at 65a. The lower courts agreed that it was "probably the most successful Chapter 11 of any magnitude in the history of the Code." *Id.* at 99a-100a. See also *id.* at 12a, 23a.

While "Baker Botts performed in an extraordinary fashion in numerous areas" of the complex bankruptcy, the "game-changer" was "Baker Botts' successful prosecution of [a fraudulent-transfer] action to recover ASARCO's crown jewel—its controlling ownership interest in SCC." Pet. App. 43a, 62a, 68a. That prosecution resulted in a judgment against the parent valued at between $7 and $10 billion—the largest ever in a Chapter 11 case and possibly the largest unreversed actual-damages award in American history. *Id.* at 43a & n.11, 68a-69a. The SCC judgment compelled the parent to fund a full-payment plan of reorganization, while the parent received release of the judgment and regained control of a newly viable, reorganized ASARCO. *Id.* at 70a, 84a.

C. Reorganized ASARCO's fee attack

Baker Botts incurred approximately $113 million in attorneys' fees and $6 million in expenses during the bankruptcy—referred to as "core fees." Pet. App. 56a.[3] The bankruptcy court found Baker Botts' work to be excep-

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[3] Petitioner Jordan, Hyden, Womble, Culbreth & Holzer, P.C. (Jordan Hyden), co-counsel to the debtor-in-possession, incurred approximately $7 million in core fees and expenses. Pet. App. 3a.

tionally efficient. "In terms of complexity and novel issues, few if any chapter 11 cases in United States history rival[ed]" this one. *Id.* at 88a. Moreover, the parent was "wholly uncooperative" throughout the bankruptcy; its "participation almost always took the form of criticism and objections to the Debtors' business judgment, to its lawyers' case handling, and [to] the Debtors' approach to a successful reorganization." C.A. Rec. 7045. Yet Baker Botts resolved ASARCO's massive environmental, tort, tax, and labor liabilities in a "remarkably short period of time" and in a manner that saved ASARCO "decades" of litigation and "hundreds of millions of dollars in professional fees." Pet. App. 73a-78a, 101a. "[N]o other firm could have achieved the results in these cases at the rates charged by Baker Botts"—indeed, for anything "less than $200 million." *Id.* at 90a, 91a.

Throughout the bankruptcy, Baker Botts filed thirteen interim fee applications. Pet. App. 56a-59a; C.A. Rec. 34520-34521. None drew objection from creditors, the U.S. Trustee, or anyone else—even the parent. The court approved each application under § 330(a). *Ibid.* ASARCO, the debtor-in-possession and Baker Botts' client, promptly paid all interim fees. *Id.* at 56a, 57a.

After the plan of reorganization took effect, Baker Botts filed a final fee application seeking approval of the $113 million in core fees and $6 million in expenses that the court had previously awarded on an interim basis. Pet. App. 56a. The fee application and supporting exhibits spanned 18,000 pages. C.A. Rec. 35775-53982. Baker Botts also sought a 20% enhancement ($22 million) to the core fee award for exceptional performance, Pet. App. 56a, which had been previously approved by ASARCO, the debtor-in-possession. Sealed C.A. Rec. 2438.

Upon the plan of reorganization's effective date, ASARCO ceased being the debtor (and Baker Botts' client). It became Reorganized ASARCO, controlled by the

parent against whom Baker Botts had obtained the multi-billion dollar fraudulent-transfer judgment. Pet. App. 3a. When Baker Botts filed its final fee application, Reorganized ASARCO launched an all-out assault, objecting to not only the enhancement, but also to Baker Botts' previously-approved and paid core fees. It attacked everything—time-entry descriptions, task codes in invoices, staffing choices, and the necessity and quality of various legal services. *Id.* at 57a-58a, 104a-130a.

ASARCO stonewalled every effort at efficiently resolving its core-fee objections. It initially refused, for instance, to specify *which* time entries it found "vague" or improperly "block billed," forcing Baker Botts to self-audit thousands of pages of invoices, culminating in a 1160-page supplement. C.A. Rec. 7469-7470, 34615-35774. Yet less than a month before the fee trial, ASARCO served Baker Botts a 104-page report accompanied by a 16-foot-tall stack of schedules containing thousands of pages of individual billing entries alleged to be non-compliant with the U.S. Trustee's guidelines and local rules. C.A. Rec. 7873-7874, 8476-34437; Sealed C.A. Rec. 770-1592. Tellingly, the U.S. Trustee—charged by statute with scrutinizing § 330(a) fee requests, 28 U.S.C. § 586(a)(3)(A)—joined *none* of ASARCO's objections and raised no objections whatsoever to Baker Botts' core fees. Pet. App. 3a, 58a.[4]

ASARCO also demanded immense discovery, forcing production of *every single document* that hundreds of Baker Botts professionals created or received during the 52-month bankruptcy. Pet. App. 3a. Baker Botts retrieved hundreds of boxes of documents from offsite

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[4] In response to ASARCO's objections, Baker Botts "voluntarily * * * credit[ed]" approximately $132,000—one-tenth of 1% of its core fees—back to the estate for certain time entries and expenses. Pet. App. 145a.

storage facilities. Reviewing them required 2,440 hours from teams of Baker Botts' lawyers and staff. Baker Botts ultimately produced 2,350 boxes of hard-copy documents (nearly six million pages) and 189 GB of electronic data (approximately 325,000 documents). Pet. App. 3a; Sealed C.A. Rec. 1916-1918. It then reserved large conference rooms to permit ASARCO's lawyers and experts to review the produced material. ASARCO sent just *two* lawyers, who spent only five days and copied 1% of the material. Sealed C.A. Rec. 1918.

ASARCO's scorched-earth fee attack was tremendously costly to Baker Botts. To defend its core fees, Baker Botts incurred over $5.2 million in fees. It incurred an additional $2.8 million pursuing its enhancement request. Baker Botts sought recovery of those amounts from the bankruptcy court. Pet. App. 57a. The U.S. Trustee did not object to Baker Botts' recovery of fees for defending its core-fee application. *Id.* at 58a-59a.

II. PROCEEDINGS BELOW

A. Proceedings in the bankruptcy court

Following a six-day fee trial, the bankruptcy court issued a detailed opinion. Pet. App. 3a, 55a-146a. It evaluated Baker Botts' core fees under § 330(a), *id.* at 86a-103a, and rejected as meritless *every one* of ASARCO's objections to Baker Botts' $113 million core fees. *Id.* at 104a-130a, 144a. It found Baker Botts entitled to an enhancement of those fees for extraordinary performance and results, but limited the 20% enhancement to the work done in the SCC litigation. *Id.* at 133a-135a. The enhancement equaled $4.1 million. *Id.* at 135a & n.103.

The court also awarded Baker Botts $5 million for fees incurred litigating its fee request. Pet. App. 144a. It noted the "unusual circumstances" in which "Baker Botts ha[d] been forced to respond" to ASARCO's barrage of empty objections to the fee application. *Id.* at 141-142a.

"Bankruptcy involves a unique process whereby a lawyer who is compensated by the bankruptcy estate must publicly file his fee statements, and multiple parties are given the opportunity to object." *Id.* at 138a. Fees for successfully "defending their fee applications in a process required by statute," the court reasoned, were compensation for services that were necessary to the administration of the bankruptcy case and beneficial to the estate. *Id.* at 138a, 140a. It also concluded that awarding defense fees was essential to avoid diluting Baker Botts' core fees and thus "undermin[ing]" § 330(a)'s "goal of compensating bankruptcy lawyers the same as non-bankruptcy lawyers." *Id.* at 137a-138a.

B. Proceedings in the district court and on remand

On appeal to the district court, ASARCO completely abandoned its objections to the core-fee award and challenged only the enhancement and defense-fee awards. Pet. App. 4a. ASARCO contended that bankruptcy courts are categorically barred from awarding defense fees as a matter of law.

The district court affirmed the enhancement, calling the SCC judgment "a once in a lifetime result." Pet. App. 44a. It also affirmed the bankruptcy court's award of fees for defending Baker Botts' core fees. *Id.* at 45a-47a. Following the "vast majority" of lower courts and the Ninth Circuit, the court concluded that fee disputes necessarily "must be dealt with as part of the administration of the case" and that "Baker Botts's actions in resolving outstanding fee issues clearly benefi[t] the estate." *Id.* at 46a-47a. Moreover, the court reasoned, "compensating bankruptcy lawyers for the preparation of and the successful defense of their fee applications is necessary to avoid unfair dilution of their fees." *Id.* at 46a.

The district court held, however, that fees were not available for pursuing a fee enhancement. Pet. App. 48a-

49a. It therefore remanded to determine whether any of the bankruptcy court's $5 million award pertained to seeking the enhancement. *Id.* at 4a, 50a. After the bankruptcy court confirmed that it had awarded Baker Botts fees only for successfully defending its core fees, *id.* at 149a-150a, the district court affirmed the final fee award. *Id.* at 4a, 157a-166a.[5]

C. The court of appeals' decision

ASARCO appealed the district court's judgment to the Fifth Circuit, again challenging both the fee enhancement and the award for Baker Botts' successful defense of its core fees. ASARCO did not challenge the amount of the defense-fee award. Nor did it dispute that, if the bankruptcy court possessed discretion to award defense fees, it reasonably awarded them here. The only defense-fee question before the court of appeals was whether bankruptcy courts may *ever* award fees under § 330(a) to bankruptcy professionals for successfully defending their core fees.[6]

The Fifth Circuit affirmed the lower courts' fee enhancement for the SCC litigation, agreeing that a "'seven billion dollar judgment, which is recoverable, which saves a company, and funds a 100% recovery for all concerned is a once in a lifetime result.'" Pet. App. 9a (quoting *id.* at 44a). It found that the crucial fraudulent-transfer judgment was due to Baker Botts' "'creativity, tenacity, and legal talent,'" not weak adversaries or good luck. *Id.* at 12a-13a (quoting *id.* at 68a).

But the court of appeals reversed the award of compensation to Baker Botts for successfully defending its

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[5] Like the bankruptcy court, the district court noted that the same principles supporting trial-level defense fees would justify an eventual award of appellate fees. Pet. App. 143a, 163a-164a.

[6] Baker Botts did not cross-appeal the district court's ruling disallowing fees for pursuing the enhancement request. Pet. App. 4a & n.3.

core-fee application. The court agreed that "the possibility of fee litigation" is "[i]mplicit" in bankruptcy because the fee-application process uniquely permits any interested party to "question bankruptcy professional fees." Pet. App. 15a. It acknowledged that after Baker Botts' "exemplary" work for ASARCO in the SCC litigation against its parent, *id.* at 12a (quoting *id.* at 62a), the parent-controlled ASARCO mounted a "large scale" yet wholly unsuccessful challenge to Baker Botts' core fees, *id.* at 3a. It conceded that defending against ASARCO's objections was incredibly burdensome and imposed a "huge cost" on Baker Botts that diluted its core fees. *Id.* at 3a, 18a-19a. And it recognized that "[t]he Bankruptcy Code plainly intended to erase the 'economy of the estate' rule under pre-existing law" and to compensate bankruptcy professionals on par with practitioners in non-bankruptcy cases. *Id.* at 18a.

Nevertheless, the Fifth Circuit held that "Section 330(a) does not authorize compensation for the costs counsel or professionals bear to defend their fee applications." Pet. App. 14a. It expressly rejected the Ninth Circuit's decision in *In re Smith*, 317 F.3d 918 (2002) (abrogated in part on other grounds by *Lamie* v. *U.S. Trustee*, 540 U.S. 526, 531-539 (2004)), which—like almost all courts—read § 330(a) as placing successful-fee-defense compensation "within the bankruptcy court's discretion to award fees for 'reasonable and necessary work.'" *Id.* at 16a (quoting *Smith*, 317 F.3d at 927-929). The Fifth Circuit correctly noted that services are compensable under § 330(a) if "they are likely to benefit a debtor's estate or are necessary to case administration." *Id.* at 15a. But its analysis focused exclusively on whether defending the fee application directly benefits the estate. In its view, the debtor's estate "bear[s] the cost" for work that "primar[il]y benefi[ts]" the professional, making fee defenses categorically non-compensable. *Ibid.* In support, the

court of appeals relied on the Eleventh Circuit's decision denying defense fees in *Grant* v. *George Schumann Tire & Battery Co.*, 908 F.2d 874 (1990). *Ibid.* Even though *Grant* was decided under a materially different prior version of § 330(a) and, unlike here, involved meritorious objections to core fees, the Fifth Circuit insisted that it "more closely reflect[ed] the statute's plain meaning." *Id.* at 16a.

The court of appeals acknowledged that other federal statutes that grant reasonable attorneys' fees are commonly construed to authorize fee-defense compensation. Pet. App. 17a. But it reasoned that those statutes displace the default "American Rule that each party to litigation bears its own costs" because the "losing party" "wears the black hat" and thus "should bear the full costs of counsel." "In bankruptcy," it postulated, "the equities are quite different." *Ibid.* "[R]equiring professionals to defend their fee applications as a cost of doing business is consistent with the reality of the bankruptcy process." *Id.* at 17a-18a. The court concluded that § 330(a)'s "reasonable compensation" provision does not "explict[ly]" displace the American Rule because "it contains no statutory provision for the recovery of attorney fees for *defending* a fee application." *Id.* at 19a (quotation omitted).

The Fifth Circuit side-stepped the disparity between bankruptcy and non-bankruptcy professional compensation wrought by its interpretation of § 330(a). It conceded that Congress wrote a "comparability factor" into § 330(a) to avoid "a professional firm's compensation [being] unfairly diluted below what comparably skilled practitioners receive in non-bankruptcy cases." Pet. App. 18a. And it did not deny that core-fee dilution is the inescapable consequence of categorically denying defense fees. *Ibid.* But because it thought parity "difficult to analyze" and not "easily" discernable by a "litmus test," the court of appeals declared the statute's parity purpose sat-

isfied so long as a bankruptcy attorney's *pre-dilution* "hourly rates" were "comparable" to non-bankruptcy rates. *Id.* at 18a-19a.

Turning to policy considerations, the Fifth Circuit discounted the bankruptcy court's view that barring defense fees creates "an incentive for parties in interest, any of which can object to professional fees, to 'mount objections to extract a fee reduction,'" which, "in turn, might discourage competent counsel from handling bankruptcy cases." Pet. App. 20a (quoting *id.* at 139a). The Fifth Circuit did not dispute that point, but simply proclaimed that "perverse incentives * * * could arise from paying the bankruptcy professionals to engage in satellite fee litigation." *Id.* at 18a. Notably, it did not assert that this concern had come to pass in the Ninth Circuit or other jurisdictions that have long left fee-defense compensation to the bankruptcy courts' discretion.[7]

SUMMARY OF ARGUMENT

The Fifth Circuit read § 330(a) to categorically bar compensation to professionals for successfully defending their core fees against meritless and burdensome attacks. This was error on every level—text, structure, history, and purpose. Even if not conclusively resolved by those considerations, the Fifth Circuit's view would fail on policy grounds.

I. Section 330(a) affords bankruptcy judges the broadest grant of discretion Congress can bestow—they "may award * * * reasonable compensation" to professionals. § 330(a)(1)(A). The few limits on that discretion are in the text itself and only highlight that fee defenses

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[7] For the same reasons given in their opinions as to Baker Botts, the bankruptcy court awarded Jordan Hyden its fees for litigating the fee application, the district court affirmed, and the Fifth Circuit reversed. C.A. Rec. 435-436, 7068; Pet. App. 2a, 21a. Further references to Baker Botts include both petitioners.

are not excluded from compensability.

For example, courts must consider various factors—not only those that are enumerated, but "all" factors that a court might identify as relevant to the reasonableness of compensation. § 330(a)(3). Through those textual factors, Congress manifested that any service "necessary" to the administration of a bankruptcy "case" (not merely an "estate") is presumptively compensable, and signaled that courts must seek parity of compensation between bankruptcy and non-bankruptcy practitioners. § 330(a)(3)(C), (F). Both principles implicate fee defenses. No case can be administered or closed without accurately determining expenses, including professional compensation. And parity cannot be achieved if fee defenses are always noncompensable. Outside of bankruptcy, a client's willingness to pay ends the matter, but bankruptcy imposes a uniquely rigorous and expensive process for public scrutiny of professional fees. If professionals must inevitably absorb those Code-mandated costs, their compensation is reduced just as if their hourly rates had been cut from the outset. They would be penalized merely for practicing in bankruptcy—the opposite of parity.

The Code demonstrates the breadth of bankruptcy-court discretion by demarcating precisely which services are categorically excluded from compensation. § 330(a)(4). It excludes only services that are *not* necessary to case administration. The Fifth Circuit wrongly added a bar to compensating fee defense—a necessary case-administration service—that Congress did not enact.

These statutory features arose from two principal bankruptcy reforms—the Code's 1978 enactment and major amendments in 1994. Congress was motivated to act because of judicial decisions focusing rigidly on whether services, no matter how necessary or unavoidable, immediately benefited an "estate." Fearing that

high-caliber professionals would depart (or never enter) bankruptcy practice if their compensation was systematically diluted compared to other fields, Congress authorized broad discretion to ensure compensation parity without diminishing the integrity of bankruptcy fees, which it protected via rigorous, public scrutiny. The Fifth Circuit's decision rejects that clear congressional policy and hearkens back to a pre-1978 standard.

Likewise, the Fifth Circuit's decision departs from decisions interpreting other statutes that similarly permit reasonable compensation. Courts—including this Court—uniformly authorize defense fees under those statutes to protect core-fee awards against dilution. Courts have found it easy to determine when to grant or deny defense fees, both in those other statutory contexts *and* under § 330(a). The judgment below is anomalous.

II. Nor do the Fifth Circuit's various policy arguments justify its aberrational decision. After all, Congress itself set the policy—to ensure adequate and non-diluted compensation—and was convinced that doing so *did* benefit not only the "estate" but every participant in the process and the economy as a whole. The Fifth Circuit's categorical bar, no less than the pre-1978 decisions which Congress so thoroughly disapproved, risks pushing the highest quality practitioners out of bankruptcy practice. While this would be dangerous for high-dollar bankruptcies like this one, its effect might be even more pronounced in smaller and consumer bankruptcies, where fee-defense costs often amount to a far higher proportion of core fees.

The Fifth Circuit's policy also misaligns the incentives among the parties. By forcing professionals to bear all defense costs, it encourages meritless objections as a tactic; rational practitioners will surrender by consenting to fee reductions even when objections are wholly meritless (as ASARCO's were here). Leaving defense-fee compen-

sation largely to the court's discretion, by contrast, discourages both improper fee requests *and* improper objections. The Fifth Circuit's other concerns are likewise better addressed via the sound discretion of bankruptcy judges familiar with individual cases than a blanket ban imposed by an appellate court.

ARGUMENT

The Bankruptcy Code expressly grants bankruptcy courts broad discretion to award professional compensation. That discretion includes the power to award professionals the amounts reasonably incurred to successfully defend their fee applications. Neither the Fifth Circuit nor ASARCO has identified anything in the statute that restricts, much less prohibits, bankruptcy courts' power to award such "defense fees." To the contrary, the text and history of § 330(a), practice under other statutes with similar grants of fee-award discretion to judges, and the broad objectives of the Bankruptcy Code uniformly militate in favor of bankruptcy judges retaining authority to make reasonable awards, subject to appellate review.

I. Section 330(a) Grants Bankruptcy Judges Discretion To Award Fees For Successfully Defending Fee Applications

Congress has repeatedly worked to foreclose judicially crafted rules that impede bankruptcy courts from awarding reasonable compensation for necessary services. The Fifth Circuit, however, bypassed those textual and structural bulwarks when it categorically proscribed defense fees. This Court should reverse.

A. Section 330(a)'s text and structure authorize the award of defense fees

"The starting point in discerning congressional intent is the existing statutory text." *Lamie*, 540 U.S. at 534. The textual question is whether defense fees may ever be part of the "reasonable compensation for actual, neces-

sary services rendered by" a bankruptcy professional that courts "may award." § 330(a)(1)(A). The question is not close: defending the fee application is an "actual, necessary servic[e]," and § 330(a)(4)'s narrow exclusions from compensability confirm that awarding defense fees remains within the bankruptcy court's broad discretion. Discretion to compensate fee defense ensures that professionals obtain non-diluted, "reasonable compensation" for their core bankruptcy work. Section 330(a)'s structure depends upon sound exercises of discretion to achieve the Code's objectives.

1. *Congress framed the compensation system around a broad grant of discretion*

a. Broad bankruptcy-court discretion over fees has long been at the core of § 330(a). Its first clause provides: "After notice to the parties in interest and the United States Trustee and a hearing, * * * the court *may award* * * * reasonable compensation for actual, necessary services rendered by" a bankruptcy professional. § 330(a)(1)(A) (emphasis added). The selected verb "may" carries substantial force in fee-related statutes, as "'[t]he word "may" clearly connotes discretion.'" *Martin* v. *Franklin Capital Corp.*, 546 U.S. 132, 136 (2005) (quoting *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 533 (1994)).

This Court reaffirmed that principle last Term. Using operative language similar to the Bankruptcy Code's, the Patent Act provides that judges "may award reasonable attorney fees," subject to the restriction that they may do so only in "exceptional cases." *Octane Fitness, LLC* v. *ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1752 (2014) (quoting 35 U.S.C. § 285). The Federal Circuit nonetheless created additional barriers to fee awards. *Id.* at 1754. This Court unanimously rejected that extra-textual approach, because the Patent Act is a "grant of discretion to district courts" limited by the "one and only * * * constraint" that a district court find the case "exceptional."

Id. at 1755-1758. The Court refused to "superimpos[e] an inflexible framework onto statutory text that is inherently flexible." *Id.* at 1756. It therefore decided *Octane* on the most basic statutory-construction grounds: "Our analysis begins and ends with the text of § 285." *Id.* at 1755.

This case should be resolved the same way. Like its Patent Act analogue, § 330(a) authorizes an award of reasonable fees in bankruptcy, subject only to carefully crafted limitations. Section 330(a) imposes a series of mandatory but non-comprehensive "factors" for judges to consider. § 330(a)(3). And when Congress wished to categorically exclude "services" from compensability, it did so expressly and precisely. § 330(a)(4). Like the Federal Circuit in *Octane*, the Fifth Circuit here impermissibly created a categorical limitation on discretion that has no textual basis.

b. Successfully defending fee applications fits comfortably within § 330(a)(1)(A)'s authorization to award "reasonable compensation" for "actual, necessary services rendered by" bankruptcy professionals. Other federal statutes that similarly authorize reasonable compensation are consistently interpreted to allow compensation for defending the fee application. See *infra* Part I.C. Most notably, in *Commissioner, INS* v. *Jean*, this Court interpreted the fee provision of the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A), which authorizes an award of "fees * * * incurred by [the prevailing] party in any civil action" against the United States. 496 U.S. 154, 158 (1990). The Court unanimously awarded "fees for the fee litigation," *id.* at 157, and refused to engraft a nontextual limitation on those defense fees. *Id.* at 160 (holding that fee applicant need not show that government's objections to fee application were not "substantially justified"). The Court explained that "[d]enying attorneys' fees for time spent in obtaining them would dilute the

value of a fees award by forcing attorneys into extensive, uncompensated litigation in order to gain any fees." *Id.* at 162 (quoting *Gagne* v. *Maher*, 594 F.2d 336, 344 (2d Cir. 1979)) (internal quotation marks omitted).

Jean dictates the result here. A statutory grant of authority to award reasonable attorneys' fees necessarily includes discretion to award defense fees to avoid dilution of the core fees previously earned.

2. *The statutory factors support discretion to award defense compensation*

Consistent with bankruptcy's equitable origins, § 330(a) guides bankruptcy courts' exercise of discretion by providing that they "shall consider * * * all relevant factors, including" but not limited to six that are enumerated, in "determining the amount of reasonable compensation to be awarded." § 330(a)(3). Most of the factors are routine, reflecting the "time spent" and "rates charged," and whether the "services were performed within a reasonable amount of time" given the nature of the work. § 330(a)(3)(A), (B), (D). Two factors, however, bear closer examination, because they clarify the scope of compensability and the requirement to compare bankruptcy compensation to that of other fields. § 330(a)(3)(C), (F). A related provision, § 330(a)(6), further confirms the breadth of discretion by supplementing the enumerated factors for only *one* type of service, preparing fee applications.

a. **Successful fee defense is "necessary" to bankruptcy "cases"**

Section 330(a)(3)(C) instructs courts to consider "whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title." This factor fleshes out § 330(a)(1)(A)'s principle that "necessary" services are compensable. And it conclusive-

ly demonstrates that courts may include time spent successfully defending fee applications within "the amount of reasonable compensation to be awarded." § 330(a)(3)(C).

The Fifth Circuit initially acknowledged that § 330(a) expressly frames the compensability threshold in terms of what advances "administration" or "completion" of the bankruptcy "case." Pet. App. 14a-15a. Yet it failed to analyze whether successful fee defenses play such a role, focusing instead on whether such defenses primarily benefit the "estate." *Id.* at 15a-17a. Immediately after correctly stating the statutory test, the court announced that

> [t]he primary beneficiary of a professional fee application, of course, is the professional. While the debtor's estate or its administration must have benefitted from the services rendered, the debtor's estate, and therefore normally the creditors, bear the cost. This straightforward reading strongly suggests that fees for defense of a fee application are not compensable from the debtor's estate.

Id. at 15a. But nothing is "straightforward" about that "reading," which ignores the statutory focus on "case" administration and directs its attention instead to what benefits "estates." The Fifth Circuit cited only one case to support its approach, but that case was decided under a prior version of § 330(a) that did *not* textually emphasize a service's role in a "case." See *ibid.* (citing *Grant* v. *George Schumann Tire & Batt. Co.*, 908 F.2d 874, 882-883 (11th Cir. 1990)).[8]

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[8] In *Grant*, moreover, the fee applicant filed an "abus[ive]" request for core fees. 908 F.2d at 884. The Eleventh Circuit's conclusion that his unsuccessful defense of the fee application "brought absolutely no benefit to the estate," *id.* at 883, must be viewed against that factual backdrop. An unsuccessful defense of an abusive application is not an "actual, necessary servic[e]" under § 330(a)(1)(A) and

The Fifth Circuit's silence about the role of fee defenses within bankruptcy cases is telling. Successfully defending a fee application is both "necessary to the administration of" and "beneficial * * * toward the completion of" a bankruptcy "case." § 330(a)(3)(C). To obtain compensation, bankruptcy professionals must file a detailed application to which any interested party may object. Fed. R. Bankr. P. 2016; § 330(a)(2). The bankruptcy court has an independent duty to ensure that the fees are justified. All of this requires the professional to expend time to respond to objections and justify the fee application before the court. That scrutiny serves to accurately determine the amount of reasonable compensation owed by the estate. This amount must be established because "compensation and reimbursement awarded under section 330(a)" is an "administrative expense" of the estate that *must* be deducted before unsecured creditors may be finally paid. See §§ 503(b)(2), 507(a)(2).

Furthermore, no bankruptcy "case" can be "complet[ed]" until the bankruptcy court makes an order allocating compensation, which requires *both* considering a fee application *and* resolving litigation over any objections. Without this fee-related litigation, as the district court explained, "the bankruptcy case cannot be put to bed." Pet. App. 47a. In short, fee-defense litigation is an integral part of a complex fee-assessment process that the Code specifically mandates.

Even if the Fifth Circuit's estate-centered focus *were* a legitimate exposition of § 330(a), its conclusion would still be wrong, for estates *do* benefit from fee defenses. At a general level, Congress recognized that qualified counsel would depart the bankruptcy field if systematically undercompensated, including by dilution of fees; it believed

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cannot survive § 330(a)(4)'s prohibitions on compensation, discussed *infra* Part I.A.3.

that *everyone*, including creditors, benefits from the positive results that come from high-quality services. See *infra* Part I.B.1. More granularly, the "estate has an interest in obtaining a just determination of the amount it should pay its professionals." *In re First State Bancorp.*, No. 7-11-11916-JA, 2014 WL 1203141, at *2 n.10 (Bankr. D.N.M. Mar. 24, 2014). Such work is "necessary and beneficial to the bankruptcy system as a whole, and indirectly, to each estate participating in the system." *Boyd* v. *Engman*, 404 B.R. 467, 483 (W.D. Mich. 2009). Still more concretely, for any estate to proceed to final payment of creditors, administrative-expense priorities *must* be established. See §§ 503(b)(2), 507(a)(2). Thus, the Ninth Circuit rightly stated that successfully defending fee applications *both* is "necessary for the administration of the case *and* provide[s] a benefit to the debtor's estate in determining the amount of the administrative fees that the estate owe[s]." *Smith*, 317 F.3d at 929 (emphasis added).

Finally, the Fifth Circuit's focus on the "primary beneficiary" of defending the fee application, Pet. App. 15a, besides being irrelevant, also "proves too much," as the District of Delaware observed. *In re Worldwide Direct, Inc.*, 334 B.R. 108, 111-112 (D. Del. 2005). All agree that *preparing* fee applications is compensable. And yet,

> [b]y definition, *every* fee petition is for the benefit of the petitioning professional. It is not that the professional benefits that is of consequence; *what matters is whether the professional's obtaining of reasonable compensation is also a benefit to the estate.*

Ibid. (emphasis added); see also *infra* Part I.A.2.c (discussing compensability of preparing fee applications). Preparation and defense equally contribute to the ultimate resolution of an accurate payment allocation. A well-grounded fee defense is thus "part and parcel" of the administration of the estate. *Boyd*, 404 B.R. at 483.

b. The discretion to award defense fees is indispensable for compensation parity

Also among the enumerated factors courts "shall consider" is "whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title." § 330(a)(3)(F). Congress adopted this "comparability" or "parity" factor to replace the old "economy of the estate" compensation policy, which intentionally directed lesser fees for bankruptcy professionals than non-bankruptcy lawyers. See *infra* Part I.B.1-2 (discussing statutory history of the parity principle). By insisting on compensation parity, this factor confirms that bankruptcy courts have discretion to award defense fees as necessary to prevent the dilution of core fees.

The Fifth Circuit did not dispute that parity is an important statutory purpose or that the arithmetic consequence of categorical defense-fee denial is dilution of core fees. Pet. App. 18a. Nor could it. Section 330(a)'s compensation process fundamentally differs from that in ordinary cases, generating defense obligations that do not arise elsewhere. Fee applications are not comparable to invoices lawyers send outside of bankruptcy. They are lengthy, detailed, and comprehensive narratives describing exactly what was done and why. See Pet. App. 17a; C.A. Rec. 35775-53882 (Baker Botts' application and supporting exhibits). Invoices outside bankruptcy are sent only to clients and often contain privileged information, but bankruptcy-estate professionals *publicly* file fee applications. Fed. R. Bankr. P. 2016. Outside bankruptcy, clients alone can challenge their lawyer's fees, and agreement to pay ends the matter without further scrutiny. Not so under § 330(a)—indeed, Baker Botts' actual client, the debtor in possession, *did* pay the fees at issue here. Pet. App. 56a, 57a. Instead, bankruptcy fee applications' excruciating detail and transparency purposeful-

ly facilitate scrutiny from many *non*-clients, and *any* party in interest can lodge objections. See 3 Collier on Bankruptcy ¶ 330.08[2][b][ii] (16th ed. 2013) (hereinafter Collier) (listing eight possible parties in interest who might challenge a fee award). And while courts rarely interfere in parties' non-bankruptcy fee agreements, "[t]he [Bankruptcy] Court has an independent judicial responsibility to review the fees of professionals, even in the absence of an objection by a party in interest." *In re LaFrance*, 311 B.R. 1, 20-21 (Bankr. D. Mass. 2004); see § 330(a)(2). The non-bankruptcy lawyers operating under the "closest parallel" to § 330(a) are those who must apply to the court for attorneys' fees under fee-shifting statutes, and they may recover the costs of successfully defending a fee application. *In re Nucorp Energy, Inc.*, 764 F.2d 655, 659 (9th Cir. 1985); see *infra* Part I.C.

The Fifth Circuit simply bypassed the comparability issue. Finding parity "difficult to analyze," subject to "no litmus test," and ultimately "in the eye of the beholder," it deemed "rough" parity achieved whenever hourly rates are comparable *before* subjecting bankruptcy practitioners to the Code's uniquely intensive fee-review process. Pet. App. 18a-19a. But when inquiries are difficult and context-dependent, the sound exercise of discretion is all the more important. Bankruptcy judges familiar with individual cases, not appellate courts, are "the beholder" whose "eye" must search for parity in the first instance. Thus, the Fifth Circuit's "difficult[y]" in determining whether Baker Botts' dilution—"only about 4.4% of the core fee," *id.* at 19a—implicates the comparability *factor* cannot support a *categorical ban* on defense fees, particularly where smaller cases often feature a much higher relative dilution. See *infra* Part II.A.2.

Comparing hourly rates is, in any event, no benchmark for genuine parity. It is merely a necessary starting point. Allowing core bankruptcy fees to wither under

relentless bankruptcy-specific attacks—forcing practitioners to use up what they have earned by defending those very earnings—is the antithesis of parity. Compensation for successful defenses "is necessary to prevent the dilution that would result if * * * attorneys were forced to absorb the time devoted to successfully litigating a fee award—an outcome that would be contrary to Congressional intent against fee award dilution." *In re Wind N' Wave*, 509 F.3d 938, 945-946 (9th Cir. 2007). Indeed, if counsel always must bear the costs of defending fee claims, courts may as well openly permit lower hourly rates from the beginning. "[R]equiring counsel who has successfully defended a fee claim to bear the costs of that defense *is no different than cutting counsel's rate.*" *Worldwide*, 334 B.R. at 112 (emphasis added).

Worse than mere apathy about dilution, the Fifth Circuit's approach *exacerbates* it by encouraging tactical strikes. "If compensation is not permitted for fees incurred in defending a fee application, creditors" (or any objecting party, like Reorganized ASARCO) "could negotiate reductions in [core] fee awards knowing full well that the attorney is in a no-win situation. Even if the attorney prevails, he or she will in effect have financed the litigation without *any hope of surviving it whole.*" *Worldwide*, 334 B.R. at 111 (emphasis added; citations and quotations omitted).

The bottom line is that reading § 330(a) "[t]o deny * * * reasonable compensation for *successfully* defending [professionals'] fee awards would dilute [their] compensation for 'actual and necessary services.'" *Smith*, 317 F.3d at 929. The Fifth Circuit's destruction of parity is especially apparent on these facts. Outside of bankruptcy, Baker Botts would have incurred no costs to collect fees voluntarily paid by its client (and approved by a neutral party, the U.S. Trustee). In bankruptcy, Baker Botts was forced to spend $5 million litigating those core fees

against a hostile third party. By forcing bankruptcy practitioners like Baker Botts to absorb defense costs that they bear *because they are bankruptcy practitioners*, the Fifth Circuit guarantees that dilution will occur, in contravention of § 330(a)(3)(F)'s factor, which vests courts with compensation discretion precisely to assure parity.

c. Courts' discretion is further constrained only in one context—fee-application preparation

Making the statutory commitment of broad general discretion all the clearer, Congress narrowed courts' compensation discretion for just one particular service: "Any compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application." § 330(a)(6). Compensation for fee-defense litigation, by contrast, remains subject only to the usual application of the § 330(a)(3) factors.

The Fifth Circuit sought to leverage § 330(a)(6) as support for categorically prohibiting fee-defense compensation. See Pet. App. 15a-16a. But for multiple reasons, that conclusion gets the matter entirely backward.

First, the Fifth Circuit correctly observed that "the specification of an award for 'preparation of a fee application' is clearly different from authorizing fees for the defense of the application in a court hearing." Pet. App. 15a. But the implied premise—that § 330(a)(6) "authoriz[es]" *anything*—is wrong. Section 330(a)(6) is "framed not as a conferral of authority but as a limitation of authority that already exists." *Setser* v. *United States*, 132 S. Ct. 1463, 1469 (2012). Like every other compensable service, fee-application preparation must be authorized by § 330(a)(1) and not be precluded by § 330(a)(4). Section 330(a)(6) does not determine *whether*, but *how much*,

to compensate for fee-application preparation. The Fifth Circuit was accordingly wrong to assume, Pet. App. 16a, that fee-application compensation would be categorically barred but for § 330(a)(6).[9]

Second, and worse than thinking that § 330(a)(6) authorizes the compensability of fee-application preparation, the Fifth Circuit believed that to be *all* that § 330(a)(6) achieves. Pet. App. 16a (contending that the provision would otherwise be "superfluous").[10] But as the court acknowledges—in the *same paragraph*—§ 330(a)(6) "emphasizes scrivener's skills over other professional work." *Ibid.* Congress did so, however, not to *authorize* compensation for application preparation, but to mandate special scrutiny of "[a]ny compensation awarded" for that tedious yet largely ministerial work. That deters professionals from using high-billing lawyers for preparing the entire application because, if they do, they will be compensated as if they had been more efficient. See, *e.g.*, S. Rep. No. 103-168, at 27 (1993) (previous Senate version of provision that became § 330(a)(6), directing the court "to recognize the difference between the cost of professional services and services for the preparation of fee applications"). There is nothing superfluous about imposing a unique limit on a single type of service. By contrast with *preparing* the application, *defending* it against objections requires not "scrivener's skills," Pet. App. 16a, but the same kind of lawyering skills that § 330(a)(3)'s general factors already cover.

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[9] "Had Congress intended compensation for professional fee applications to be allowable as 'reasonable and necessary' under Section 330(a)(3)(C), there would have been no need to create the limits specified in subdivision (4)." Pet. App. 16a. The Fifth Circuit's reference to § 330(a)(4) appears to be intended to refer to § 330(a)(6). *Ibid.*

[10] Again, the Fifth Circuit's reference to "Section 330(a)(4)" being rendered superfluous appears to be intended to refer to § 330(a)(6). Pet. App. 16a.

Third, the Fifth Circuit found it "untenable to construe this language [*i.e.*, § 330(a)(6)] *alone* to encompass satellite litigation over a fee application." Pet. App. 16a (emphasis added). That, however, is not petitioners' argument, because § 330(a)(6) does not authorize compensation of any kind; it merely channels discretion in determining the amount. But by directing the right *way* to compensate it, § 330(a)(6) reflects that fee-application preparation is compensable under § 330(a)(1) without being rendered non-compensable under § 330(a)(4). There can be no doubt, then, that such preparation is "necessary to the administration of the case."

As discussed *supra* Part I.A.2.a, fee *defense* is equally "necessary" to case administration because both preparation and defense are inextricably linked components of the same Code-mandated process for determining the estate's administrative expenses. This Court and others have long recognized that there is "no textual or logical argument for treating so differently a party's preparation of a fee application and its ensuing efforts to support that same application." *Jean*, 496 U.S. at 162 (rejecting argument that applicant bears a higher burden to establish compensability of defense fees); accord *Kinney* v. *IBEW*, 939 F.2d 690, 694 n.4 (9th Cir. 1991) (finding "no difference in principle between the time spent preparing a fee application and the time spent successfully defending the application" because "[b]oth are a necessary part of the award of attorney's fees"). That principle resolves this case: Preparation is compensable under § 330(a)(1), and defense must therefore be as well.

3. *Congress addressed what services are categorically non-compensable, and did not exclude fee defense*

Section 330(a)(4)(A) imposes the only categorical prohibitions on "services" bankruptcy courts may not compensate. Where Congress has granted broad discretion

to award fees subject to defined limits, appellate courts may not impose additional restrictions. *Octane*, 134 S. Ct. at 1754-1758. Congress enacted two such limits here. First, "courts shall not allow compensation for unnecessary duplication of services." § 330(a)(4)(A)(i). All agree that does not apply here. Second, courts may not compensate "services that were not (I) reasonably likely to benefit the debtor's estate; *or* (II) necessary to the administration of the case." § 330(a)(4)(A)(ii) (emphasis added). Stated positively, courts may compensate a "servic[e]" that *is* reasonably likely to benefit the debtor's estate or *is* necessary to the administration of the case. See Pet. App. 15a (Fifth Circuit agreeing that "professional services are compensable only if they are likely to benefit a debtor's estate or are necessary to case administration").

The prohibition thus mirrors the mandatory factor contained in § 330(a)(3)(C). So long as a service is "necessary to the administration of the case," a bankruptcy court has discretion to include it within "reasonable compensation." Because successfully defending a fee application is plainly such a necessary service, it is compensable. See *Smith*, 317 F.3d at 928-929; *supra* Part I.A.2.a.

As in *Octane*, § 330(a)(4)(A) imposes the "one and only * * * constraint on district courts' discretion to award attorney's fees." 134 S. Ct. at 1756. By focusing exclusively on whether services directly benefit the "estate," the Fifth Circuit erred by engrafting a categorical limitation on compensation that Congress did not adopt.

* * *

Congress could have built § 330(a) by limiting professional compensation to specific services expressly enumerated in the statute. But it instead invested bankruptcy judges with wide latitude, subject only to the exclusions of § 330(a)(4). The blanket prohibition of fee-

defense compensation in this case is awkwardly superimposed over the intentionally *non*-categorical scheme that Congress actually enacted.

B. Section 330(a)'s history reflects Congress's purpose of ensuring full compensation to bankruptcy lawyers, including defense fees

The Fifth Circuit's holding that, as a matter of law, § 330(a) does not permit the award of defense fees, Pet. App. 14a, 20a, contravenes the statute's plain text. That text embodies a specific and unambiguous congressional purpose, as § 330(a)'s history reveals, to ensure compensation parity so as to provide top-quality counsel in bankruptcy. The Fifth Circuit's ruling disregarded that purpose and instead deployed arguments that Congress has emphatically repudiated.

1. *The Bankruptcy Code replaced the "economy of the estate" approach with a parity requirement*

Before Congress enacted the Bankruptcy Code of 1978, practitioners were compensated under the old Bankruptcy Act, "which emphasized economy of administration and conservation of the estate." *In re UNR Indus., Inc.*, 986 F.2d 207, 208 (7th Cir. 1993) (citing *In re Beverly Crest Convalescent Hosp., Inc.*, 548 F.2d 817, 820-821 (9th Cir. 1976)). Some courts insisted that any payments "be administered with severe economy * * * so as to reduce to the lowest minimum the costs of administration." *In re Lang*, 127 F. 755, 757 (W.D. Tex. 1904). But even those not inclined to "sever[ity]" nonetheless recognized that the "economical spirit of the Bankruptcy Act" required, at a minimum, awarding "fees at the lower end of the spectrum of reasonableness." *Jacobowitz* v. *Double Seven Corp.*, 378 F.2d 405, 408 (9th Cir. 1967). Bankruptcy counsel were seen to be "acting as officers of the court" who "should not be compensated as generous-

ly as they might be if privately employed." Collier ¶ 330.03[3].

Congress found this short-sighted policy counterproductive to the long-term interests of a functional bankruptcy system—penny-wise but pound-foolish. "Bankruptcy specialists," it recognized, are "who enable the system to operate smoothly, efficiently, and expeditiously." H.R. Rep. No. 95-595, at 330 (1977). But "if required to accept fees in all of their cases that are consistently lower than fees they could receive elsewhere," it concluded, such practitioners "will not remain in the bankruptcy field." *Ibid.* Losing (and failing to attract) high-quality practitioners would diminish the system's effectiveness, undermining the goals of salvaging businesses (and preventing the loss of jobs) and maximizing recovery for creditors.

A central objective of the Bankruptcy Code of 1978, therefore, was to ensure compensation parity between bankruptcy and non-bankruptcy practitioners. See Springer, Damned If You Do, Damned If You Don't—Current Issues for Professionals Seeking Compensation in Bankruptcy Cases Under 11 U.S.C. § 330, 87 Am. Bankr. L.J. 525, 529 (2013). The joint statement of the floor managers of the bill that became the Bankruptcy Code acknowledged that "[a]ttorneys' fees in bankruptcy cases can be quite large and should be closely examined by the court. However, bankruptcy legal services are entitled to command the same competency of counsel as other cases." 124 Cong. Rec. 32,394 (1978) (Joint Explanatory Statement) (remarks of Rep. Edwards); accord 124 Cong. Rec. 33,994 (1978) (Joint Explanatory Statement) (remarks of Sen. DeConcini). Accordingly, "the policy of [§ 330(a)] is to compensate attorneys and other professionals serving in a case under title 11 at the same rate as the attorney or other professional would be compensated for performing comparable services" in non-bankruptcy

cases. 124 Cong. Rec. at 32,394.

Congress achieved that objective by enacting the original § 330(a), which expansively authorized "reasonable compensation for actual, necessary services," and mandated that, in fixing such compensation, courts consider "the cost of comparable services other than in a case under this title." 11 U.S.C. § 330(a)(1) (1982). See also Collier ¶¶ 330.03[3], 330.03[12], 330.LH[3] (discussing how the Code "abandoned" the "spirit of economy" principle). Today, § 330(a)(3)(F) reflects that principle. From enactment through today, "the new policy" in § 330(a) has been one of "compensation in parity with that received by attorneys performing services in comparable situations." Collier ¶ 330.03[3]; see also, *e.g.*, *UNR*, 986 F.2d at 209. That principle of parity is so well established that even the Fifth Circuit acknowledged it, Pet. App. 18a, before proceeding to undermine it.

2. *Congress repudiated lingering economy-of-the-estate rulings in its 1994 amendments*

Not all courts eagerly embraced the Code's reforms; some adopted rules that undercut parity and inflicted the harms the Code sought to ameliorate. For example, courts divided over whether preparing and defending fee applications was compensable. See Springer, *supra*, at 529-530 (collecting cases); Collier ¶ 330.03[16][a][i]. In its 1994 amendments to the Code, therefore, Congress substantially expanded § 330(a) to make even more unequivocal its disapproval of artificial and dilutive limits on compensation. Those amendments brought § 330(a) essentially into its present form.

a. Perhaps most significantly, the 1994 amendments added the textual emphasis on "cases" (rather than merely "estates"). This responded to courts that, relying on the comparatively laconic version of § 330(a) from the 1978 Code, insisted on identifying immediate benefits to

the estate before finding a service compensable.

First, Congress added factors governing discretion, including § 330(a)(3)(C), which requires courts to consider whether "services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a *case*" in bankruptcy. § 330(a)(3)(C) (emphasis added). See Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 224(b), 108 Stat. 4106, 4130 (1994). Some prior caselaw, focusing on "estates," emphasized creditors' immediate interests, but § 330(a)'s premise is that creditors benefit in the long run by fully compensating counsel, including for case-administration services. The original 1992 Senate version of § 330(a) would have required courts to consider "the total value of the estate and the amount of funds available for distribution to creditors." S. Rep. No. 102-279, at 22 (1992). But Congress deleted that myopic estate-focused provision and enacted § 330(a)(3)(C)'s case-focused factor.[11]

Second, through § 330(a)(4)'s textual exclusions, Congress demonstrated that "services" are compensable if they were "reasonably likely to benefit the debtor's estate *or* necessary to the administration of the *case*" § 330(a)(4)(A)(ii) (emphasis added). See 108 Stat. at 4131.

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[11] The Fifth Circuit has gone beyond even the failed Senate value-of-the-estate proposal, which would not have supported a *categorical* defense-fee bar where, as here, creditors are fully paid and bear no fee-defense costs (which instead would be borne solely by now-reorganized ASARCO, the party who caused them). If the court of appeals' ruling would contravene even a proposal that Congress rejected as too severe, it is doubly clear that it contravenes the law Congress actually enacted. Thus, even assuming that bankruptcy courts *may* exercise discretion to deny (or only partially compensate) defense fees because a particular estate has minimal funds to pay creditors—a question this Court need not decide—that could never justify the Fifth Circuit's blanket ban.

This was deliberate. The initial version of § 330(a)(4) in the bill reported by the Senate Judiciary Committee provided that "[t]he court shall not allow compensation for duplicative services or services that are not reasonably likely to *benefit the debtor's estate*." S. Rep. No. 102-279, at 22 (emphasis added). Congress refused to take this backward step, and instead cemented a standard that expressly covers the entire "case," *even if* a given service does not directly benefit the estate.[12]

b. The same provisions also indicated the breadth of bankruptcy-court discretion in other ways. Beyond merely adding the factors, for instance, Congress explicitly authorized consideration of "*all* relevant factors, *including*" but not limited to the six that were expressed. § 330(a)(3) (emphasis added).

Likewise, given the reluctance of some courts to abandon the old economy-of-the-estate approach, Congress could anticipate that old-school judicial hostility to bankruptcy fees would tempt some courts into imposing absolute prohibitions of their own making; this case demonstrates as much. In a stroke, § 330(a)(4) pretermitted any need to predict *specific* manifestations of that hostility. Its text and placement within § 330(a)'s structure sought to forestall *all* such efforts by conclusively drawing the line demarcating where compensation is categorically foreclosed.

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[12] Senator DeConcini vigorously objected to the estate-focused provisions in the initial 1992 Senate version. See S. Rep. No. 102-279, at 54. He warned that they "could lead to the situation where fees for necessary services * * * are denied because they are deemed not reasonably likely to benefit the estate." *Ibid.* In turn, this could "reduce significantly the number of bankruptcy specialists practicing in the area" and "turn the clock back" to pre-1978 conditions. *Ibid.* Congress heeded those concerns by enacting § 330(a)'s provisions that allow compensation for case-administration services.

3. *The Fifth Circuit's categorical defense-fee prohibition contravenes Congress's purpose*

Given this history, the Fifth Circuit's decision—and its rationale—are particularly indefensible. The Fifth Circuit even deployed the very arguments that pre-1994 courts had erroneously made when denying compensation for fee-application preparation and defense. The Fifth Circuit here reasoned that "[t]he primary beneficiary of a professional fee application, of course, is the professional"; estates "normally * * * bear the cost" of compensation for defending fee applications (although not here, where creditors received 100 cents on the dollar); and therefore fee-defense is "a cost of doing business" to be borne by professionals, lest "perverse incentives * * * arise from paying the bankruptcy professionals to engage in satellite fee litigation." Pet. App. 15a, 17a, 18a. The parallels with the pre-1994 (indeed, pre-1978) courts' analysis are striking. Those courts reasoned that "(1) such time benefits only the applicant and not the estate; (2) allowing such compensation encourages excessive fees; and (3) such time is essentially a non-reimbursable cost of doing business." Springer, *supra*, at 530 (summarizing holdings of collected pre-1994 cases).

Hearkening now—in 2014—back to anti-parity and estate-focused analysis is worse than anachronistic. It represents the very ill that Congress sought to correct in 1978 and to finally purge from judicial practice in 1994.

C. The Fifth Circuit erroneously applied the American Rule, despite unbroken precedent allowing defense fees under other "reasonable compensation" statutes

The defense-fee award to Baker Botts in this case is wholly justified by § 330(a)'s text, structure, and history. But fee awards are not unique to bankruptcy practice, and experience in other contexts is instructive. Courts,

including this Court, have consistently interpreted other "reasonable compensation" statutes to include fees for defending the fee requests. The reasons for awarding defense fees under these statutes apply equally to bankruptcy cases.

The Fifth Circuit acknowledged that defense fees are available when other statutes include a general grant of authority to award fees. It identified no statute in which defense fees were specifically authorized before courts treated them as compensable. Nor did it point to textual authority in § 330(a) that indicated a limitation on discretion compared to other statutes. Instead, it simply declared that bankruptcy is "different," and rejected the analogy to other statutes out of hand. Pet. App. 17a. This was error.

1. *Statutes using language like § 330(a)'s displace the American Rule and authorize defense fees*

The Fifth Circuit invoked the so-called "American Rule," a presumption that parties to litigation bear their own attorneys' fees. Pet. App. 19a-20a. But that doctrine "is merely a default rule" that is "often changed by statute." *J.R. Cousin Indus., Inc.* v. *Menard, Inc.*, 127 F.3d 580, 583 (7th Cir. 1997). In a host of contexts, Congress has displaced the American Rule with "specific and explicit provisions for the allowance of attorneys' fees." *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 260 (1975); see *id.* at 260 n.33 (collecting statutes).

Section 330(a)(1)'s grant of "reasonable compensation for actual, necessary services rendered" by a bankruptcy professional is one such provision. In *Alyeska*, this Court cited the reasonable-compensation provision in the Bankruptcy Act of 1898—the Bankruptcy Code's predecessor—as an example of an explicit statutory fee allowance that overcame the American Rule. 421 U.S. at 260 n.33. Commentators consistently list § 330(a) of the modern

Bankruptcy Code among "the federal statutes which make specific provision for awards of attorney's fees," thereby displacing the American Rule. 1 Rossi, Attorneys' Fees §§ 10.1, 10.13-10.18 (3d ed. 2001) (hereinafter Rossi); see also 1 Conte, Attorney Fee Awards § 1.1 (3d ed. 1993); 3 *id.* §§ 22.1-22.9. The Fifth Circuit itself noted that § 330(a) represents a "more elaborate framework" for fees than even the 1898 Act had. Pet. App. 20a. Nor has the Fifth Circuit or ASARCO ever denied that § 330(a)(1)'s "reasonable compensation" provision trumps the American Rule by authorizing a bankruptcy professional's recovery of *core fees*.

Instead, the court of appeals drew a curious line, holding that the American Rule bars *defense fees* for bankruptcy professionals because § 330(a) does not "explict[ly]" state that a court may award "'fees for *defending* a fee application,'" Pet. App. 19a (quoting *In re Teraforce Tech. Corp.*, 347 B.R. 838, 867 (Bankr. N.D. Tex. 2006) (Fifth Circuit's emphasis)). But nowhere does it explain why § 330(a)—unlike other federal fee statutes—must specifically single out defense fees for compensation to overcome the American Rule.

The lack of such an explanation is glaring. Numerous federal statutes provide in language similar to § 330(a)'s that a court "may" award a party "reasonable" compensation for attorneys' fees. So far as petitioners know, none of them explicitly authorizes fees for defending the fee application. Yet this Court and the courts of appeals have uniformly interpreted such broad textual grants of fee authority to include authority to award defense fees as inherent in and inextricable from the general grant. The courts of appeals have thus faithfully followed this Court's lead in *Jean*, holding that courts possess discretion to award defense fees to avoid dilution of reasonable compensation for core work.

For example, the courts of appeals "consistently have

construed the Civil Rights Acts to provide for 'fees on fees' despite the absence of clear Congressional directives within those Acts." *Hernandez* v. *Kalinowski*, 146 F.3d 196, 200 (3d Cir. 1998). More particularly, courts have interpreted the "reasonable attorney's fee" provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), and the Fair Housing Act of 1968, 42 U.S.C. § 3612(c), to authorize defense-fee awards, even though "those statutes did not expressly" grant compensation for fee litigation. *Wind N' Wave*, 509 F.3d at 942 (collecting circuit cases). And "cases permitting an award of 'fees on fees'" under 42 U.S.C. § 1988, which also authorizes a "reasonable attorney's fee" for prevailing civil rights plaintiffs without specifying that defense fees are compensable, "are legion." *Kinney*, 939 F.2d at 695 n.6 (collecting circuit cases).[13]

2. *Absent express preclusion, defense fees are part of a general grant of discretion*

The Fifth Circuit's analysis was backward. Rather

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[13] See also, *e.g.*, *Gagnon* v. *United Technisource, Inc.*, 607 F.3d 1036, 1044-1045 (5th Cir. 2010) (permitting defense fees under "reasonable attorney's fees" provision of Fair Labor Standards Act, 29 U.S.C. § 216(b)); *Hernandez* v. *Kalinowski*, 146 F.3d 196, 200 (3d Cir. 1998) (permitting defense fees under Prison Litigation Reform Act's provision for "fee[s] * * * directly and reasonably incurred in proving an actual violation of the plaintiff's rights," 42 U.S.C. § 1997e(d)(1)); *Student Pub. Interest Research Grp., Inc. of N.J.* v. *Windall*, 51 F.3d 1179, 1190 (3d Cir. 1995) (permitting defense fees under "reasonable attorney * * * fees" provision of Clean Water Act, 33 U.S.C. § 1365(d)); *Angela L.* v. *Pasadena Indep. Sch. Dist.*, 918 F.2d 1188, 1197 (5th Cir. 1990) (permitting defense fees under "reasonable attorney's fees" provision of Handicapped Children's Protection Act of 1986, 20 U.S.C. § 1415(e)(4)(B)); *Powell* v. *C.I.R.*, 891 F.2d 1167, 1172 (5th Cir. 1990) (permitting defense fees under "reasonable litigation costs" provision of Internal Revenue Code, 26 U.S.C. § 7430(a)(2)); 1 Rossi, Attorneys' Fees § 6.15 n.1 (3d ed. 2001) (collecting additional cases addressing these and other statutes).

than looking for some statutory language that specifically authorized defense fees, it needed to identify text that specifically precluded them. Once the American Rule has been displaced and reasonable fees are authorized, the burden belongs with the party objecting to defense fees to demonstrate why the American Rule has suddenly sprung back to life.

Fee statutes empower courts to award defense fees because their broad textual fee authorization vests courts with wide discretion to determine what fees are justified in a particular case. See *Octane*, 134 S. Ct. at 1755-1756. Thus, where a fee statute's text expansively authorizes fees without specifying compensable litigation phases or tasks, the statute is properly construed to *permit* fees for fee litigation, not to *forbid* them. In *Jean*, the statutory trigger was that fees were recoverable if the government's position was not "substantially justified." 496 U.S. at 158 (quoting 28 U.S.C. § 2412(d)(1)(A)). The plaintiff had made that threshold showing, but the government contended that the statute did not permit a defense-fee award unless the district court *additionally* found no substantial justification for the government's position *in the fee litigation*. *Id.* at 157. This Court unanimously disagreed, finding "most telling" the "complete absence of any textual support" for so limiting the district court's power to award defense fees. *Id.* at 158-159. Like "other fee-shifting statutes," the Court observed, the Equal Access to Justice Act's text authorized attorneys' fees "without any reference to separate parts of the litigation," "treating a case as an inclusive whole, rather than as atomized line-items." *Id.* at 159, 162 (citation omitted). The Court thus concluded that once the statute's textual fee-eligibility criteria were met, the fee authorization "cover[s] the cost of all phases of successful civil litigation," including fee litigation. *Id.* at 166.

The Fifth Circuit did not engage that logic, much less

explain why it does not apply to the Bankruptcy Code. But the analogy is unmistakable. Baker Botts satisfied the statutory requirement for fees, and nothing in § 330(a) carves out only *some* "phases of successful [bankruptcy] litigation" as qualifying for fee eligibility. *Jean* alone should suffice to reverse the judgment below.

3. *Defense fees in other contexts avoid fee dilution—a central objective of § 330(a)*

Defense-fee awards are not only a permissible exercise of courts' textually broad discretion to award "reasonable attorney's fees" under other statutes, but they have also been recognized as necessary to avoid diluting core-fee awards below the textually-mandated "reasonable" fee—one of the key objectives of § 330(a).

a. Dilution is an inherent threat to any fee-award regime. "If an attorney is required to expend time litigating his fee claim, yet may not be compensated for that time, the attorney's effective rate for all the hours expended on the case will be correspondingly decreased." *Prandini* v. *Nat'l Tea Co.*, 585 F.2d 47, 53 (3d Cir. 1978) (holding that Title VII's grant of reasonable attorneys' fees conveys authority to award defense fees). The "vast majority" of courts of appeals has likewise emphasized the core-fee dilution that would inevitably occur if attorneys' fees could not be awarded under fee statutes for time spent defeating fee objections. 1 Rossi § 6.15 (collecting cases).

Such fee dilution would thwart not only the text but also the purpose of fee statutes, further confirming that the textual authority to award "reasonable attorney's fees" encompasses defense fees. As courts have consistently observed, Congress enacts fee statutes to "encourag[e] * * * attorneys to represent" clients in cases that vindicate congressional policies. *Gagne*, 594 F.2d at 344 (quoting *Prandini*, 585 F.2d at 53). Subjecting attorneys to

uncompensated fee litigation, however, "would permit a deep pocket losing party to dissipate the incentive provided by [a fee] award through recalcitrance and automatic appeals." *Ibid.* (quoting *Souza* v. *Southworth*, 564 F.2d 609, 614 (1st Cir. 1977)). Accordingly, courts have routinely concluded that statutory fee provisions granting reasonable attorneys' fees are properly construed to authorize defense-fee awards, lest "the denial of [defense] fees" deprive litigants of competent counsel and "indirectly crippl[e]" the purpose behind Congress's grant of fees. *Hairston* v. *R&R Apartments*, 510 F.2d 1090, 1092 (7th Cir. 1975); accord 1 Rossi § 6.15.

b. All of these rationales are equally consistent with the unambiguous "parity" objective that Congress embraced in § 330(a). See *supra* Parts I.A.2.b, I.B.1. Courts that have found defense fees to be compensable under § 330(a) have recognized them as an essential tool to achieve the statute's anti-dilution goal. *Ibid.* The same threat that *Gagne* recognized—challenges knowingly forced on a successful professional by an objector wishing "to dissipate the incentive" of an award, 594 F.2d at 344—is no less present in bankruptcy, and courts have cited that threat in upholding the legitimacy of defense fees. See, *e.g.*, *Worldwide*, 334 B.R. at 111. Thus, as in other contexts, the discretion to make defense-fee awards must be available in bankruptcy to ensure that professionals' core fees are not diluted in violation of § 330(a)(1)'s command of "reasonable" compensation.

c. The Fifth Circuit attempted to elide these similarities by suggesting that fee awards under fee-shifting statutes are meant to punish the losing party, whereas "[n]o side wears the black hat for administrative fee purposes" in bankruptcy. Pet. App. 17a. But contrary to the "black hat" implication, civil-rights fee awards are "*not* meant as a 'punishment' for 'bad' defendants." *Williams* v. *Hanover Hous. Auth.*, 113 F.3d 1294, 1302 (1st

Cir. 1997) (emphasis added). After all, it is taxpayers who often foot the bill in such cases. Rather, they are "meant to compensate civil rights attorneys who bring civil rights cases," *ibid.*, thus "attract[ing] competent counsel," *Blum* v. *Stenson*, 465 U.S. 886, 897 (1984) (internal quotation marks omitted)—a goal indistinguishable from § 330(a)'s purpose of retaining competent counsel in bankruptcy. Core-fee dilution through the categorical denial of defense fees, whether in bankruptcy or other fee contexts, frustrates the congressional design.

D. Courts have found no difficulty in awarding (or denying) defense fees

The Fifth Circuit contended that it was "difficult" to apply § 330(a)'s parity rationale to defense fees. Pet. App. 18a. But just as courts have found it easy to prevent dilution of fees under other statutes, they have found it no more complicated under § 330(a) itself. Courts across the country routinely and effectively determine when (and at what level) defense-fee compensation is warranted,[14] and when discretion should be exercised to deny defense fees.[15]

The Fifth Circuit acknowledged that "[c]ase law addressing [defense-fee compensability] is divided," Pet. App. 14a, but it omitted how lopsided the conflict is. "The

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[14] At least thirty-six cases from twenty-nine courts in ten different circuits have acknowledged bankruptcy courts' discretion to award compensation for successful fee defenses. See Pet. App. G (collecting cases).

[15] See Pet. App. 170a (collecting cases discretionarily denying defense fees). Courts readily deny defense fees when the fee-application defense was unsuccessful or for some other reason did not warrant compensation. See, *e.g.*, *In re Riverside-Linden Inv. Co.*, 945 F.2d 320, 323 (9th Cir. 1991) (affirming bankruptcy court's denial of fees for a failed defense); *In re Erewhon, Inc.*, 21 B.R. 79, 89-90 (Bankr. D. Mass. 1982) (denying compensation for "time spent by counsel seeking to justify its own request for an excessive fee").

vast majority of courts find that compensating bankruptcy lawyers for the preparation of and the successful defense of their fee applications is necessary to avoid unfair dilution of their fees." Pet. App. 46a (district court opinion). Other than the bankruptcy courts in the Northern District of Texas and Western District of New York, no court has consistently denied defense fees as a matter of law after the 1994 amendments.[16] And, so far as petitioners are aware, only the Northern District of Texas bankruptcy court has denied defense fees when, as here, creditors received 100 cents on the dollar.[17]

Courts, in other words, have long been comfortable treating defense fees as essentially indistinguishable from other services that are compensable. The Fifth Circuit's sudden decision to join the two bankruptcy courts that consistently treat those fees as categorically outside the scope of § 330(a) was erroneous, and this Court should restore Congress's vision of parity achieved through careful scrutiny and the sound exercise of bankruptcy-court discretion.

II. The Judgment Below Thwarts The Sound Functioning Of The Bankruptcy System

"If we add to all this the apparent sound functioning of the bankruptcy system under the plain meaning approach" discussed above, the Fifth Circuit's policy arguments are all the more "unconvincing." *Lamie*, 540 U.S. at 537. Enforcing the congressional grant of discretion to

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[16] See, *e.g.*, *In re Teraforce Tech. Corp.*, 347 B.R. 838, 867 (Bankr. N.D. Tex. 2006); *In re St. Rita's Assocs. Private Placement, L.P.*, 260 B.R. 650, 652 (Bankr. W.D.N.Y. 2001). A few courts have categorically denied fees for both preparation and defense of fee applications, see Pet. App. G, an indefensible position after the 1994 amendments, see Part I.A.2.c, *supra*.

[17] See *Frazin* v. *Haynes & Boone LLP* (*In re Frazin*), 413 B.R. 378, 407 (Bankr. N.D. Tex. 2009), aff'd in part and rev'd in part on other grounds, 732 F.3d 313 (5th Cir. 2013).

award defense fees has promoted the sound functioning of the bankruptcy system for decades; the court of appeals' categorical bar would obstruct it. None of that court's policy arguments supports a total defense-fee ban. The sound exercise of case-by-case bankruptcy-court discretion fully addresses each concern.

A. Discretion to award defense fees prevents systemic harms

1. Bankruptcy judges' discretion to award reasonable compensation for defense fees protects against the systemic harms that motivated the major 1978 and 1994 bankruptcy reforms. Congress understood that massive and complex bankruptcies such as ASARCO, Enron, Lehman Brothers, American Airlines, and the City of Detroit, to name a few just since 2000, affect the economic health of entire regions and industries. "The fundamental purpose of reorganization," after all, "is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources." *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 528 (1984). In 2011 and 2012 alone, 173 public companies—with assets approaching $175 billion—filed for bankruptcy. Mastroianni, The 2014 Bankruptcy Yearbook & Almanac 31 (24th ed. 2014). Saving businesses, or at least winding them down as efficiently as possible, helps creditors and everyone else involved. Congress saw that high-quality professionals are indispensable in preventing crises from becoming unmitigated disasters in the fast-paced and high-stress arena of bankruptcy practice. Competent representation is central to one of the Code's overriding goals: allowing salvageable companies to "continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders." H.R. Rep. No. 95-595, at 220.

Motivated by these important national interests, Congress sought to dissuade talented practitioners from

leaving (or failing to enter) the bankruptcy field. It concluded that the *ancien regime*, notable for its inherent lack of compensation parity, threatened to deprive businesses of quality counsel at the time they need them most—when their very survival is at stake. See *supra* Part I.B.1. Rules that diminish the incentives of qualified counsel to enter bankruptcy practice mean fewer success stories like ASARCO, "a broke and broken company" transformed into "a reorganized ASARCO, cleansed of its historical liabilities and well-positioned to compete effectively in the world of commerce." Pet. App. 65a.

The Fifth Circuit's approach is particularly discordant given its stated concern that, ordinarily, "almost everyone loses something" in bankruptcy, and so sound policy requires minimizing costs to the estate at the expense of counsel. Pet. App. 16a-17a (quoting *Grant*, 908 F.2d at 882). It rests on the simplistic premise that the "pie" is fixed, making bankruptcy practitioners nothing more than cost centers. This very case proves how wrong that is. As the Fifth Circuit itself acknowledged, "[c]reditors were expected to receive cents on the dollar." *Id.* at 12a (quoting Pet. App. 63a). Yet they were paid *in full*—because Baker Botts expanded the pie beyond any legitimate prospect.[18] The Fifth Circuit could hardly have chosen a less apposite case in which to impose policy views that are at odds with the facts.[19]

2. Defense-fee compensation may be even more ur-

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[18] That included nearly $1.8 billion paid to the Department of Justice and 14 states to fund environmental cleanup. Sealed C.A. Rec. 1665.

[19] Further challenging the Fifth Circuit's premise, Congress has indicated that preserving the estate for general creditors does not trump everything else. It designed a priority distribution scheme in § 507, with ten categories of claims paid before unsecured creditors receive *anything*. Administrative expenses, of which § 330(a) compensation is a subset, constitute merely one of those categories.

gently needed to protect smaller and consumer bankruptcies, which require access to competent, moderately priced counsel. In those cases, the threat of systematic fee dilution from meritless objections is especially acute. For example, in *Smith*, defense fees were about 25% of core fees. 317 F.3d at 922 (firm "recovered approximately $175,000" in core fees and over $47,000 in defense fees and costs).

Defeating objections may require substantial efforts even for small core-fee awards. Objections and defense are hardly scalable to core fees. If solo practitioners and smaller firms must absorb defense costs simply to collect their earned fees, many would surely withdraw from bankruptcy and turn to other practices without such onerous overhead.

3. Remarkably, the Fifth Circuit's response to these serious concerns was to advise professionals to avoid dilution by increasing their upfront, hourly rates in *all* bankruptcies. Pet. App. 18a. n.7. Perversely, this would inflate costs to *all* estates—even when wholly unjustified and unnecessary. Some attorneys would reap windfalls; others might still end up undercompensated. The Fifth Circuit's advice would expose the system as a whole to considerable harm for no gain.[20]

Case-by-case discretion avoids all of that. It allows bankruptcy courts to award defense fees only in the segment of cases where core fees are contested *and* the

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[20] Anticipatorily inflated fees would also be subject to challenge under § 330(a)(3)(B) and (F); parity is no more respected by inflating bankruptcy rates than by diluting them. Likewise, the U.S. Trustee's Guidelines prevent such inflation by requiring evidence that rates charged are *not* higher merely because the case arose in bankruptcy. Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under United States Code by Attorneys in Larger Chapter 11 Cases, 78 Fed. Reg. 36,248-02, 36,255 (June 17, 2013).

court deems defense fees reasonable based on its day-by-day supervision of the case. Rather than the one-size-fits-all "solution" proffered by the court of appeals, the traditional exercise of discretion by bankruptcy judges permits tailoring and precision.

B. Discretion to award defense fees aligns the parties' incentives appropriately

1. Discretion to compensate successful fee-application defenses properly aligns the incentives of both fee applicants and potential objectors. An applicant, aware that it will bear the costs of responding to meritorious objections, will be deterred from inflating bills. Objectors, knowing that the estate will not have to pay defense fees for an unsuccessful fee defense, will remain motivated to raise *meritorious* objections that preserve the estate. But they will remain appropriately deterred from raising *meritless* objections if it is clear that successful fee defenses may be compensated.

The Fifth Circuit's rule, by contrast, would overwhelmingly shift the costs and risks onto fee applicants. As now-Third Circuit Judge Jordan perceived, categorically denying defense fees would "provide an unhealthy incentive for persons opposed to professional fees to mount spurious objections as a means of extracting fee reductions, rather than because the work done for the estate was genuinely not for the benefit of the estate." *Worldwide*, 334 B.R. at 112; accord *Smith*, 317 F.3d at 929. Removing courts' ability to distinguish between meritless and meritorious objections promotes bad behavior by eliminating all downside risk for objectors—even those (like ASARCO) who lose every single objection yet impose extraordinary costs on the applicant, who (like Baker Botts) must respond to all objections, regardless of how meritless.

The disproportionate allocation of costs increases the

likelihood of burdensome fee objections by disgruntled litigants, as in this case. It required little effort for ASARCO to inflict crushing discovery obligations and shotgun objections on Baker Botts; yet ASARCO hardly reviewed the documents it requested and abandoned all of its baseless objections on appeal. See *supra* at 11-13. This distortion of incentives is particularly pronounced where, as here, the objector itself—successfully reorganized ASARCO—is entitled to all the proceeds of the estate. See Pet. App. 84a. Who wouldn't play poker if he keeps the winnings but someone else buys the chips?

If this schematic is frozen into settled law, there is every reason to expect that ASARCO's conduct will be replicated; those similarly situated have little incentive not to emulate ASARCO, and considerable incentive to do so. Rational fee applicants will accede to objectors' extortionate demands at the outset and forfeit duly earned fees, knowing that those fees will be reduced by the cost of litigation *even if they completely prevail*. *Worldwide*, 334 B.R. at 111.

2.a. The court of appeals characterized the incentive structure quite differently: "The perverse incentives that could arise from paying the bankruptcy professionals to engage in satellite fee litigation are easy to conceive." Pet. App. 18a; *id.* at 17a ("Litigation of professionals' fee applications may become substantial, costly and time-consuming if counsel can be compensated for their self-interested efforts."). That is plainly mistaken. Allowing discretionary compensation for *successfully* defending a fee application cannot possibly incentivize bad behavior by a fee applicant.

To begin with, applicants cannot initiate "satellite fee litigation"—an objector or the court must first raise some objection to the application. Once that occurs, the applicant will go *un*compensated for unsuccessfully defending exorbitant requests or (even if successful) wastefully re-

sponding to objections. Compare *Wind N' Wave*, 509 F.3d at 946 (awarding fees where successful defense was not mounted "merely to acquire litigation fees"), with *In re Riverside-Linden Inv. Co.*, 945 F.2d 320, 323 (9th Cir. 1991) (affirming bankruptcy court's denial of fees for a failed defense). Defense fees, in other words, are denied where the fee application was "meritless" or defense was undertaken "merely to get litigation fees." *Smith*, 317 F.3d at 928, 929 (citations omitted). See also *supra* n.15.

Awarding compensation when the applicant, as here, successfully and efficiently defends an application accords with the statutory requirement that services be necessary to the administration of the case. See §330(a)(3)(C), (a)(4)(A)(ii)(II); *Smith*, 317 F.3d at 928. Such an adversarial process, necessary for accurately determining the estate's administrative expenses, is precisely what bankruptcy law is designed to encourage. Cf. *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 418-419 (1978) ("A fair adversary process presupposes both a vigorous prosecution and a vigorous defense.").

b. As another ground for barring defense fees, the court of appeals speculated that a "conspiracy of silence" may sometimes exist between fee applicants and potential objectors. Pet. App. 20a. No evidence supports that assertion. Regardless, it could not justify categorically denying defense fees in the many cases where the fee-application process *is* contested. No "conspiracy of silence" could exist there. And often, as here, there is no motivation for a "conspiracy," given that the objector has no claim for fees from the estate and thus no "conspiratorial" reason to withhold objections to debtor's counsel fees. Far from being tempted into silence, such objectors—like ASARCO—may harbor longstanding animus against the debtor's counsel.

Beyond those scenarios, in all bankruptcies the U.S. Trustee is charged by statute to monitor and object to

unreasonable fees. See 28 U.S.C. § 586(a)(3)(A). Even before the judgment below invited objections to professional fees, they arose in 10% of all (and 20% of large) Chapter 11 bankruptcies.[21] And even absent objections, "[t]he court has an independent obligation to review all fee applications and evaluate the propriety of the compensation requested." Collier ¶ 330.03[5][e]. All of these sources require the good-faith, adversarial defense of fee applications—and inflict fee dilution if successful defenses are never compensated.

But even supposing a conspiracy of silence were ever plotted, and that it somehow evaded the court's and Trustee's independent review, there would be no need for an applicant to request *defense fees* at all. The Fifth Circuit's remedy is untethered to the harm it perceives.

3. If any validity attended the Fifth Circuit's view of incentives, nearly three decades of data—since *Nucorp*—from the Nation's largest bankruptcy circuit would demonstrate as much. Cf. *Lamie*, 540 U.S. at 537 (rejecting argument where "[s]eeming order has attended the [contrary] rule's application for five years in the Fifth Circuit and for four years in the Eleventh Circuit"). Yet the Fifth Circuit steadfastly remained in the realm of speculation. It identified no evidence—not one example—in which the Ninth Circuit's rule encouraged, or even failed to penalize, inefficient fee litigation. Nor have cases from the many other jurisdictions that have long left fee-defense compensation within the bankruptcy courts' authority shown anything but the same sober exercises of discretion that attend all fee-related decisions.

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[21] See Presentation of the Landmark ABI Fee Study: Conclusions and Ramifications 8, ¶¶ 15-16 (American Bankruptcy Institute, Winter Leadership Conference 2007), available at http:goo.gl/zZltxr; Lubben (Reporter), Chapter 11 Professional Fee Study 35 (American Bankruptcy Institute 2007).

Compensating only necessary and successful defenses functions as a built-in disincentive both to meritless fee applications and meritless fee challenges.

In *Jean*, this Court rejected the argument that allowing defense fees would "encourage exorbitant fee requests, generate needless litigation, and unreasonably burden the federal fisc." 496 U.S. at 162-163. The Court disagreed because trial courts "retain substantial discretion" over defense-fee awards. *Id.* at 163. Moreover, "[i]f the [objector] could impose the cost of fee litigation on prevailing parties," the statute's policy goals would be thwarted. *Id.* at 163-164. Both points fully apply here.

4. The court of appeals professed "confiden[ce]" that any remaining incentive distortions can be dealt with by bankruptcy courts—even as it removed the chief tool that bankruptcy courts use to achieve that goal. The Fifth Circuit thought that exercising "vigilance and sound case management"—including fee shifting for "bad faith" or "vexatiou[s]" conduct—could "thwart punitive or excessively costly attacks" on fee applications. Pet. App. 21a.

This case and many other reported defense-fee cases cast doubt on that unexplained and unsupported assertion. True, if professionals can prove a rare violation of Bankruptcy Rule 9011 (analogous to Federal Rule of Civil Procedure 11) or the common-law bad-faith standard of *NASCO* v. *Chambers, Inc.*, 501 U.S. 32, 45-46 (1991), then objectors would face sanctions that might include attorneys' fees. But lawyers can be savvy enough to approach the steep sanctions threshold without crossing it, while nonetheless imposing unreasonable burdens that dilute core fees. While "sanctions provide some protection against harassment, a fee objection is a gambit easily veiled in a policy of economy." Springer, *supra*, at 539 n.101. Regardless, § 330(a)'s text permits discretionary defense-fee awards *without* having to establish that an "attack" was "punitive" or "excessively costly," much less

in "bad faith." Pet. App. 21a. The court of appeals' well-founded trust in bankruptcy judges' case-management abilities, *ibid.*, should instead have given it confidence that they would judiciously award defense fees.[22]

This Court repeatedly has rejected attempts to limit statutory attorneys' fees—including defense fees—to those incurred responding to bad-faith (or even less egregious) litigation. *Jean* refused to limit defense fees to cases where the government's core-fee objections were "not substantially justified." 496 U.S. at 157. Even prevailing *defendants* in civil-rights actions need not show that plaintiffs brought claims in "bad faith" to recover fees. *Christiansburg*, 434 U.S. at 419. And while the Patent Act textually restricts attorneys' fees to "exceptional" cases, the Court recently refused to equate that limit to sanctionable conduct. *Octane*, 134 S. Ct at 1756-1757. If requiring bad faith "had been the intent of Congress, no statutory provision [allowing fees] would have been necessary, for it has long been established that even under the American common-law rule attorney's fees may be awarded against a party who has proceeded in bad faith." *Christiansburg*, 434 U.S. at 418-419; accord *Octane*, 134 S. Ct. at 1758 (reading in a bad-faith threshold would render attorney-fee provision "superfluous").

* * *

This case does not present the question of whether the bankruptcy and district courts properly exercised discre-

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[22] Nor does an applicant's "[c]ompliance with the rules" requiring detailed fee applications, Pet. App. 17a, or the Code's "capacious reasonableness and necessity standards," in fact "shield * * * [professionals] from attempts at fee reduction," *id.* at 21a. As this case illustrates, meritorious fee applications under the Code's capacious compensation standards provide no protection against core-fee dilution and pose no deterrent to objectors who can impose the full costs of objections even on applicants who prevail.

tion in awarding and upholding defense fees for Baker Botts. ASARCO argued only that courts *never* possess authority to award such fees under § 330(a). This Court should enforce the text, structure, history, and purpose of § 330(a), to conclude that bankruptcy courts do have authority to award defense fees. The Court need not further define the circumstances when defense fees may or may not be awarded. As in *Octane*, it suffices to reverse the Fifth Circuit's counter-textual bar on such fees and instruct that bankruptcy "courts may determine whether [defense fees are compensable under § 330(a)'s test] in the case-by-case exercise of their discretion, considering the totality of the circumstances." 134 S. Ct. at 1756. Bankruptcy courts will draw on a deep body of precedent and practice in making those determinations, both under § 330(a) and other fee statutes. Accordingly, the judgment below should be reversed.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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BAKER BOTTS L.L.P. AND JORDAN, HYDEN, WOMBLE, CULBRETH & HOLZER, P.C.,
Petitioners,

v.

ASARCO LLC,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED

Petitioners served as Chapter 11 debtor's counsel under § 327(a) of the Bankruptcy Code ("Code"), which permits bankruptcy trustees or debtors-in-possession to employ attorneys, accountants, and other professionals "that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee [or debtor-in-possession] in carrying out the trustee's [or debtor-in-possession's] duties under this title." 11 U.S.C. §§ 327(a), 1107(a). Section 330(a) governs compensation for § 327(a) professionals, authorizing bankruptcy courts to award from estate funds "reasonable compensation for actual, necessary services rendered by" the professionals. *Id.* § 330(a)(1).

After petitioners filed fee applications seeking compensation under § 330(a) for their bankruptcy work, litigation ensued between petitioners and ASARCO, the reorganized debtor, over the fee requests. Petitioners sought an award of over $8 million for fees incurred in the adverse fee litigation, on top of the $124 million they were paid for their bankruptcy work at standard hourly rates (plus enhancements). The longstanding American Rule provides that parties to litigation must generally bear their own fees absent express congressional authorization to shift fees to the losing party.

The question presented is whether § 330(a) of the Code expressly authorizes bankruptcy professionals to recover fees incurred in adverse fee litigation against the bankruptcy estate.

RULE 29.6 STATEMENT

Respondent ASARCO LLC is wholly owned, directly or indirectly, by Americas Mining Corporation, which in turn is wholly owned by Grupo Mexico, which is publicly traded in Mexico.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES vi

INTRODUCTION 1

STATUTORY PROVISIONS INVOLVED 4

STATEMENT OF THE CASE 4

A. Statutory Background 4

B. Factual Background 6

C. Procedural History 8

SUMMARY OF ARGUMENT 10

ARGUMENT 14

I. Section 330(a) Of The Bankruptcy Code Does Not Authorize Fees For Fee Litigation 14

A. The Code's text does not expressly authorize fees for fee litigation 15

1. Section 330(a) creates a limited compensation scheme that does not include adverse litigation over fees 15

2. The American Rule forecloses any argument for "fee-shifting" under § 330(a) 19

3. Petitioners' and the Government's positions disregard § 330(a)(1)'s text.....22

4. Other § 330(a) provisions reinforce that fees for fee litigation are not authorized.....26

a. Section 330(a)(4) ensures fee-litigation fees are non-compensable.....26

b. Section 330(a)(6) removes any doubt that fees for fee litigation are not authorized.....29

c. Section 330(a)(3)'s factors confirm the Fifth Circuit's ruling.....34

B. Petitioners' and the Government's views would allow fees for *unsuccessful* fee defenses and other collateral fees.....36

C. The comparison to fee-shifting statutes is misplaced.....39

II. Congress's Decision Not To Compensate For Fee-Litigation Work Under § 330(a) Advances Important Policy Objectives.....44

A. The Fifth Circuit's rule achieves Congress's desire for parity.....45

1. Refusing fees for fee litigation treats bankruptcy and non-bankruptcy lawyers the same.....45

2. The dilution concern is unfounded 48

3. Petitioners also misunderstand parity 50

4. Disallowing fees for fee litigation risks no flight of attorneys from bankruptcy 54

B. The Fifth Circuit's rule gives all parties the proper incentives 56

CONCLUSION 58

APPENDIX

11 U.S.C. § 327(a) 1a

11 U.S.C. § 328(a) 1a

11 U.S.C. § 328(c) 1a

11 U.S.C. § 330(a) 2a

TABLE OF AUTHORITIES

Page(s)

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Alyeska Pipeline Serv. Co. v. *Wilderness Soc'y*, 421 U.S. 240 (1975) 19, 20, 21, 22, 25

In re ASARCO LLC, 420 B.R. 314 (S.D. Tex. 2009) 6

Beecham v. *United States*, 511 U.S. 368 (1994) 15

Boyd v. *Engman*, 404 B.R. 467 (W.D. Mich. 2009) 31

Branch v. *Smith*, 538 U.S. 254 (2003) 15

In re Brous, 370 B.R. 563 (S.D.N.Y. 2007) 20, 45

In re Busy Beaver Bldg. Ctrs., Inc., 19 F.3d 833 (3d Cir. 1994) 48

In re CCT Commc'ns, Inc., 2010 WL 3386947 (Bankr. S.D.N.Y. 2010) ... 30, 36

Chambers v. *NASCO, Inc.*, 501 U.S. 32 (1991) 50

Commissioner, INS v. *Jean*, 496 U.S. 154 (1990) 33, 34, 41, 43

In re Consol. Bancshares, Inc., 785 F.2d 1249 (5th Cir. 1986) 48

Cooter & Gell v. *Hartmarx Corp.*, 496 U.S. 384 (1990) 24, 56

In re Crescent City Estates, LLC, 588 F.3d 822 (4th Cir. 2009) 21

In re DN Assocs.,
165 B.R. 344 (Bankr. D. Me. 1994) 48

In re Drexel Burnham Lambert Grp., Inc.,
133 B.R. 13 (Bankr. S.D.N.Y. 1991) 51

In re Duratech Indus., Inc.,
241 B.R. 291 (Bankr. E.D.N.Y. 1999) 56

Fogerty v. *Fantasy, Inc.*,
510 U.S. 517 (1994) 21

Fox v. *Vice*,
131 S. Ct. 2205 (2011) 19, 43

In re Frazin,
413 B.R. 378 (Bankr. N.D. Tex. 2009) 20

Gade v. *Nat'l Solid Wastes Mgmt. Ass'n*,
505 U.S. 88 (1992) 40

In re Gibbons-Grable Co.,
151 B.R. 814 (N.D. Ohio 1992) 49

Grant v. *George Schumann Tire & Battery Co.*, 908 F.2d 874 (11th Cir. 1990) 27, 43

Gross v. *FBL Fin. Servs., Inc.*,
557 U.S. 167 (2009) 20, 39

In re Gulf Consol. Servs., Inc.,
91 B.R. 414 (Bankr. S.D. Tex. 1988) 46

Hardt v. *Reliance Standard Life Ins. Co.*,
560 U.S. 242 (2010) 19, 20, 39

Key Tronic Corp. v. *United States*,
511 U.S. 809 (1994) 19

Lamie v. *U.S. Trustee*,
540 U.S. 526 (2004) ..... *passim*

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86 F.3d 1232 (D.C. Cir. 1996) 56

McNeill v. *United States*,
131 S. Ct. 2218 (2011) 36

Morrison v. *Nat'l Australia Bank Ltd.*,
561 U.S. 247 (2010) 21

In re Nucorp Energy, Inc.,
764 F.2d 655 (9th Cir. 1985) 36

Octane Fitness, LLC v. *ICON Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014) 14, 22

Perdue v. *Kenny A. ex rel. Winn*,
559 U.S. 542 (2010) 39, 43, 44

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519 U.S. 337 (1997) 14

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317 F.3d 918 (9th Cir. 2002) 9, 28, 36

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260 B.R. 650 (Bankr. W.D.N.Y. 2001) 33, 45

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Whitfield v. *United States*,
2015 WL 144680 (U.S. 2015) 17

In re Wireless Telecomms. Inc.,
449 B.R. 228 (Bankr. M.D. Pa. 2011) 30, 45

Woods v. *City Nat'l Bank & Trust Co.*,
312 U.S. 262 (1941) 17

Statutes

11 U.S.C. § 110(i) 41
11 U.S.C. § 327 ..... 1, 5, 12, 43
11 U.S.C. § 327(a) ..... *passim*
11 U.S.C. § 328 ..... 1, 5, 12, 43
11 U.S.C. § 328(a) 4, 5, 38
11 U.S.C. § 328(c) ..... *passim*
11 U.S.C. § 330(a) ..... *passim*
11 U.S.C. § 330(a) (1994) 52
11 U.S.C. § 330(a)(1) ..... *passim*
11 U.S.C. § 330(a)(1)(A) 5
11 U.S.C. § 330(a)(3) ..... *passim*
11 U.S.C. § 330(a)(3)(C) 35, 36
11 U.S.C. § 330(a)(3)(F) 35
11 U.S.C. § 330(a)(4) ..... *passim*
11 U.S.C. § 330(a)(4)(A) 28
11 U.S.C. § 330(a)(4)(A)(ii) 26, 28, 29
11 U.S.C. § 330(a)(4)(A)(ii)(I) 27
11 U.S.C. § 330(a)(4)(A)(ii)(II) 27
11 U.S.C. § 330(a)(6) ..... *passim*
11 U.S.C. § 503(b) 5
11 U.S.C. § 507(a) 6
11 U.S.C. § 523(d) 41
11 U.S.C. § 1107(a) 4
35 U.S.C. § 285 22
42 U.S.C. § 1988 ..... 39, 40, 44
Act of June 7, 1934, ch. 424, sec. 77B(c)(8), 48 Stat. 911 (1934) 16

Act to Establish a Uniform Law on the Subject of Bankruptcies, Pub. L. No. 95-598, tit. II, ch. I, sec. 330, 92 Stat. 2549 (1978) 16, 50, 51

Bankruptcy Act of 1898 ..... 16, 21

Chandler Act, ch. 575, ch. X, art. XII, secs. 241-45, 52 Stat. 840 (1938) 16

Equal Access to Justice Act, 28 U.S.C. § 2412(d) 33, 34, 40

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78 Fed. Reg. 36,248 (June 17, 2013):
p. 36,248 22
p. 36,249 53
p. 36,250 ..... *passim*
pp. 36,265-69 53
p. 36,269 ..... *passim*
p. 36,271 ..... 22, 24
pp. 36,274-75 50
p. 36,275 24

Fed. R. Bankr. P. 2016(a) 28, 32

Fed. R. Bankr. P. 2016(a) (1994) 28

Fed. R. Bankr. P. 9011(c)(2) 50

Miscellaneous

124 Cong. Rec. 32,394 (1978) 51

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INTRODUCTION

This case presents a clear choice between enforcing the statutory text as written—as the Fifth Circuit did—or embracing a judicially-created fee-shifting regime based on policy concerns. The question is whether § 330(a)[1] of the Code expressly authorizes bankruptcy professionals to recover attorneys' fees incurred while litigating fee disputes—i.e., "fees-on-fees"—against the estate. That is, in addition to their fees for the underlying bankruptcy work (paid at standard hourly rates), petitioners seek another layer of fees for litigation *adverse to the estate*.

Absolutely nothing in § 330(a) authorizes that counterintuitive result. Section 330(a), together with §§ 327 and 328, creates a compensation scheme for many different professionals, not just attorneys, to be paid for authorized work. Section 327(a) authorizes a trustee or debtor-in-possession to employ a wide variety of professionals to assist the trustee or debtor-in-possession, as long as they are free from interests adverse to the estate. Section 330(a)(1) then authorizes "reasonable compensation for...necessary services rendered by" professionals hired under § 327(a). Thus, the statutes clearly provide reasonable compensation for services that assist the work of the trustee or debtor-in-possession.

But when a dispute arises over the reasonableness of the professional's fees, nothing in the text authorizes shifting the professional's attorneys' fees in the event the professional prevails in litigation adverse to the estate. The relevant statutory provi-

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[1] Statutory references and citations are to the current version of Title 11 of the U.S. Code, unless indicated otherwise.

sions that authorize compensation for non-adverse work that serves the estate hardly allow compensation for work that is adverse to the estate and benefits only the professional, at the *direct expense* of the estate. That result is perfectly clear from the text of the statute read in isolation; there is a world of difference between compensation for services provided to the trustee and attorneys' fees for litigation adverse to the estate. But this conclusion is buttressed by the American Rule, which generally requires parties in adverse litigation to bear their own litigation costs in the absence of express congressional authorization. As the Fifth Circuit correctly concluded, nothing in the text of § 330(a) authorizes such fee-shifting for an attorney engaged in litigation adverse to the estate.

Petitioners purport to ground their position in text, but it is a façade. They note that § 330(a)(1) authorizes "reasonable compensation," but almost always omit the critical textual qualifier "reasonable compensation *for...necessary services rendered by*" a professional. The United States ("Government") correctly recognizes that petitioners' textual arguments reflect an untenable interpretation of § 330(a)(1).

Petitioners' disregard for text also leads them to borrow from prevailing-party, fee-shifting statutes. But those statutes demonstrate what a fee-shifting statute that overcomes the American Rule looks like, and § 330(a)(1) looks nothing like those statutes. Fee-shifting statutes focus on attorneys' fees (not compensation for a wide variety of professionals) and use the language of "prevailing party" (not assisting the trustee or the estate). Section 330(a) uses materially distinct language in prescribing a different fee regime that is based on a different underlying ra-

tionale. Petitioners' improper reliance on prevailing-party statutes, and their failure to respect statutory text, are on full display in their assumption that their argument would allow fees-on-fees only for "successful" applicants. As the Government recognizes, petitioners' textual argument would logically permit fee-shifting even for *unsuccessful* fee applicants, which is absurd. The justification for fees in the bankruptcy context is assisting the trustee, not succeeding (let alone failing) in adverse litigation.

At bottom, petitioners' position is based on little more than policy concerns about "dilution" of fee awards and "parity" between bankruptcy and non-bankruptcy lawyers. The Government now takes this position as well, candidly arguing that policy concerns about "dilution" justify a "judicial exception" from the American Rule and the clear text of § 330(a)(1). But even if policy concerns could trump the statutory text and the default presumption of the American Rule, it is the Fifth Circuit's rule—not petitioners'—that *ensures* actual parity. If non-bankruptcy lawyers or accountants end up in adverse litigation with their client over fees, they do not then get to send the client a bill for fees incurred in the fee dispute. Petitioners are not seeking true parity, but a rule that would make bankruptcy lawyers the envy of the legal profession. In addition to compensation at hourly rates for services rendered, plus costs incurred in preparing fee applications, bankruptcy lawyers' fees would continue to accumulate even while litigating against their client over the amount of the fees. To the extent "parity" is relevant at all, it supports the decision below.

This case illustrates well why it would be a mistake to allow fees-on-fees under § 330(a). After re-

ceiving over $120 million for their bankruptcy work (at full hourly rates), plus another $4 million in enhancements, petitioners asked for *$8 million more* for time spent litigating their fees and pursuing enhancements. They deployed nearly 200 timekeepers to work on this, which included a $400,000 "self-audit" of their time entries and a $750,000 review of the client's file. Under these circumstances, it strains credulity for petitioners to suggest that their fees have been "diluted" or that fee-shifting is needed to ensure that lawyers will continue to take bankruptcy cases. This Court should affirm the Fifth Circuit's ruling that nothing in § 330(a) authorizes the windfall sought by petitioners.

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Bankruptcy Code, 11 U.S.C. §§ 327(a), 328(a), 328(c), & 330(a), are set forth in the Appendix to this brief at 1a-4a.

STATEMENT OF THE CASE

A. Statutory Background

The Bankruptcy Code empowers trustees, with bankruptcy court approval, to "employ...attorneys, accountants,...or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title." § 327(a). Chapter 11 debtors-in-possession possess the same power.[2] § 1107(a).

Section 330(a) establishes a framework for compensating professionals employed under § 327(a).

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[2] For simplicity, this brief refers only to trustees, though the same rules apply for debtors-in-possession.

This provision applies to all authorized professionals performing services for a trustee, not just attorneys. Section 330(a)(1)(A) states that courts "may award" "reasonable compensation for actual, necessary services rendered by" professionals. It then lists factors courts must consider in "determining the amount of reasonable compensation." § 330(a)(3). It provides that courts "shall not allow compensation for" "unnecessary duplication of services" or "services that were not—" "reasonably likely to benefit the debtor's estate" or "necessary to the administration of the case." § 330(a)(4). It also states: "Any compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application." § 330(a)(6).

Section 328 also affects professional compensation. First, § 328(c) reinforces § 327(a)'s requirement of non-adversity by stating a "court may deny allowance of compensation for services...of a professional person employed under section 327...if, at any time during such professional person's employment under section 327..., such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed." Second, § 328(a) allows trustees (with court approval) to employ § 327 professionals on predetermined fee arrangements as an alternative to § 330(a)'s compensation scheme.

The professional compensation that §§ 327, 328, and 330(a) authorize, unlike the attorneys' fees that fee-shifting statutes award, is ordinarily not paid by a party that has lost contested litigation. Instead, it is an administrative expense the bankruptcy estate pays before paying unsecured creditors. §§ 503(b),

507(a). Because estates are usually unable to pay all creditors, "every dollar paid for administrative expenses including professional fees detracts from the unsecured creditors' recovery." Pet.App.16a-17a.

B. Factual Background

1. ASARCO is a copper mining, smelting, and refining company. Pet.App.2a. In 2005, ASARCO suffered from historically low copper prices. *In re ASARCO LLC*, 420 B.R. 314, 355-56 (S.D. Tex. 2009). Faced with low prices, a striking workforce, and major environmental and asbestos liabilities (among other factors), ASARCO sought bankruptcy protection. *Ibid.* Petitioners were retained as debtor's counsel under § 327(a). C.A.Rec.1016-18.

Reorganized ASARCO emerged from bankruptcy in December 2009. Pet.App.83a. While petitioners claim credit for single-handedly engineering a "rags-to-riches" turnaround, Pet.Br.8-9, 49, they cannot claim responsibility for a key factor in the reversal of fortune: a substantial rise in copper prices that allowed ASARCO to generate over $1 billion in cash during the bankruptcy. *ASARCO*, 420 B.R. at 319, 346, 355; see Pet.App.134a.

2. Following consummation of the parent company's plan, petitioners filed final fee applications seeking, *inter alia*, (i) over $120 million in fees (at full hourly rates) for work done as debtor's counsel, (ii) more than $24 million in fee enhancements, and (iii) over $8 million in fees for litigating their fee applications and fee enhancements. Pet.App.56a; C.A.Rec.7051.

Petitioners suggest that they provided "excruciating detail" in their applications, Pet.Br.27-28, but the record shows otherwise. For example, Baker

Botts' applications had time entries with nothing more than "conference call," "work on strategy," "work on various legal issues," or "work regarding plan issues." C.A.Rec.34944, 34953-74, 35000-06, 35649-56. Sometimes, such vague descriptions were given for days of time. ASARCO objected to vague descriptions that violated local rules. C.A.Rec.6062-64; see 3 Collier on Bankruptcy ¶ 330.03[6] (16th ed. 2014) ("Collier") ("Most courts find entries such as 'telephone call' or 'meeting' unacceptable...."). ASARCO also objected to entries pervasively lumped or block-billed, in violation of local rules, and fees for non-compensable clerical or administrative tasks. C.A.Rec.6058-68, 34857-88, 35147-240, 35423-60; see 3 Collier ¶ 330.03[6] ("[C]ourts do not fully compensate professionals who lump a number of activities into a single entry."). See also Br.Opp.11 (citing cases sustaining similar objections).[3]

The bankruptcy court scheduled deadlines to adjudicate the dispute. Baker Botts then conducted a "self-audit" to correct its invoices—even though the invoices should have been prepared correctly the first time. Contrary to its claim that its original time entries were proper, Baker Botts generated a "1160-page supplement," Pet.8; C.A.Rec.34614-5774, then sought over $400,000 in fees for making those corrections. Pet.App.49a-50a; C.A.Rec.6897.

Petitioners also racked up more fees during the litigation. For example, when ASARCO requested part of its client file, Baker Botts—without notifying

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[3] ASARCO also objected to the requested fee enhancements, noting that petitioners had been adequately compensated at their standard hourly rates which had *increased* throughout the bankruptcy. Sealed.C.A.Rec.592-93, 598.

ASARCO of any allegedly unreasonable burdens associated with complying—spent 2,440 hours purportedly to ensure privileged materials of *other* clients were not in ASARCO's file. Pet.8-9. That alone added $750,000 to Baker Botts' fees-on-fees request. C.A.Rec.6897.

In the end, petitioners claimed to incur over $8 million in litigation fees for a five-month pursuit of fee enhancements and base fees—including billing from 191 Baker Botts timekeepers (150 attorneys). C.A.Rec.6893-900; Pet.App.27a-28a. ASARCO objected, arguing § 330(a) does not allow such fees and that the request was excessive. C.A.Rec.6883-902. Contrary to petitioners' assertions that ASARCO's objections "required little effort" and had no "downside risk," Pet.Br.51-52, ASARCO incurred almost $2 million in fees in the litigation, C.A.Rec.6941-44.

C. Procedural History

1. In approving petitioners' $120 million base-fee requests in full, the bankruptcy court adopted petitioners' proposed findings wholesale. Pet.App.55a-146a.[4] While the court denied ASARCO's objections, there was no contention or finding that the objections were made in bad faith. Pet.App.21a. The court also awarded $4.1 million in fee enhancements. Pet.App.133a-135a. Further, while the court found the requested collateral fees were "higher than were reasonable or necessary," it awarded $5 million for seeking *both* base fees and enhancements. Pet.App.140a-142a. Citing policy concerns such as

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[4] The lower courts issued separate, but not materially different, opinions for each petitioner; this brief will refer to the opinions addressing Baker Botts. See US.Br.8 n.4.

dilution, the court concluded that § 330(a)(6) allows such collateral fees. Pet.App.136a-141a.

The district court adopted the bankruptcy court's reasoning in allowing fee-litigation fees, yet held petitioners could not recover fees for seeking enhancements and remanded for determination of which fees were related to litigating base fees and which were incurred for enhancements. Pet.App.45a-49a, 54a. On remand, the bankruptcy court somehow concluded that the *entire* $5 million related solely to litigating the base fees, and not a penny was incurred in pursuing enhancements.[5] Pet.App.147a-151a.

2. The Fifth Circuit reversed on fees-on-fees, holding that § 330(a) "does not authorize compensation for the costs counsel or professionals bear to defend their fee applications." Pet.App.14a. Whereas the Ninth Circuit had held that § 330(a) allows fees-on-fees to avoid dilution of fee awards—even though the statute is "silent" about fees-on-fees, *In re Smith*, 317 F.3d 918, 928-29 (9th Cir. 2002)—the Fifth Circuit rejected that course. Pet.App.15a-17a. Finding an "absence of explicit statutory guidance" for fees-on-fees, it applied the "American Rule that each party to litigation bears its own costs." Pet.App.17a. The court concluded, *inter alia*, that fees incurred litigating a fee request are not compensable under § 330(a)(4) because they are neither beneficial to the estate nor necessary to case administration; such

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[5] Given the discretion afforded to bankruptcy courts, ASARCO elected not to appeal the base-fee ruling or the fees-on-fees amount. Petitioners contend this is an acknowledgement the objections were "baseless," Pet.Br.5, 52, but deciding not to challenge a ruling under an abuse-of-discretion standard in no way admits the position was without justification.

work benefits the professional, and the estate would bear the cost. Pet.App.14a-16a.

The court found § 330(a) materially different from fee-shifting statutes in the civil-rights context, noting that "Congress designed fee shifting provisions in express derogation of the American Rule," with the intent that "the losing party should bear the full costs of counsel for the winner." Pet.App.17a. No such "explicit statutory guidance" exists in § 330(a), and "the equities are quite different" in bankruptcy. Pet.App.17a-18a. The court also rejected the "comparability" argument. Pet.App.18a-19a. It credited the opinion of an "astute bankruptcy court" that comparability supports the *denial* of fees in this context because, under the American Rule, non-bankruptcy lawyers cannot recover fees incurred in fee litigation with a client. Pet.App.19a.

In sum, although § 330(a) unquestionably authorizes compensation for professional services rendered to the estate, it "is not fairly read to include 'fees for defense of fees' either as reasonable, necessary costs of case administration or to prevent dilution of...core fees." Pet.App.20a. The Fifth Circuit emphasized that its "opinion should not be read as encouraging tactical or ill-supported objections to fee applications"—none of which was alleged here—and explained that courts have ample means to avoid bad-faith objections to fees. Pet.App.20a-21a.

SUMMARY OF ARGUMENT

The Fifth Circuit correctly held that § 330(a)'s straightforward text does not authorize fees for fee litigation. There is no doubt that the fees petitioners seek were incurred in adversarial litigation. And there is no question the American Rule provides a

default rule that such litigation fees are not recoverable absent express congressional authorization.

In §§ 330(a)(1) and 327(a), Congress enacted a limited authorization of fees for a wide variety of professionals for their work performed for a trustee. Such professionals may receive "reasonable compensation for...necessary services rendered by" them to assist the trustee with its duties. As the Government correctly recognizes, "services rendered" includes only the professionals' work performed *for others in the bankruptcy*, not collateral litigation that is *adverse* to the estate and performed solely for the professionals' own benefit. That rather obvious inference is further reinforced by §§ 327(a) and 328(c), which emphasize that professionals can be retained and compensated only for pursuing matters not adverse to the estate. Unlike fee-shifting statutes, these Code provisions are not specific to adversarial litigation or prevailing parties, and they do not remotely reverse the American Rule.

Section 330(a)(4) also bars self-interested fees-on-fees work because such work is neither beneficial to the estate—it *diminishes* the estate—nor necessary to the case. Moreover, the fact that § 330(a)(6) expressly references *preparation* of fee applications as compensable (at a lower rate), yet § 330(a) says nothing anywhere about compensation for fee disputes, underscores that Congress did not intend to depart from the American Rule for fees-on-fees. Fee applications—whether by lawyers or other professionals like accountants or appraisers—are a necessary component of providing services to the trustee. But the same cannot be said for adversarial litigation over fees, which unquestionably triggers the American Rule. The difference is starkly illustrated

in the context of non-lawyer professionals such as accountants. There is an obvious distinction between compensating an accountant for both her underlying accounting services and a fee application covering those services, versus compensating the accountant's lawyers for successfully litigating an objection to those fees. The latter situation, like petitioners' adverse litigation of a fee dispute, squarely implicates the American Rule.

To attack the Fifth Circuit's holding, petitioners and the Government try different theories, with the Government readily acknowledging that petitioners' statutory arguments are wrong. Ultimately, though, petitioners and the Government end up in the same place: needing a policy-based exception to the American Rule that reads a prevailing-party concept into § 330(a). But petitioners' theory largely ignores the key text in § 330(a)(1) and would logically lead to awarding fees-on-fees even where the fee applicant is *unsuccessful*. And the Government candidly requests a "judicial exception" to the American Rule based on policy concerns about fee "dilution"—the very same dilution concern that the Government rejected below as "without merit."

Both petitioners and the Government attempt to shoehorn their policy arguments into § 330(a)(3), which outlines factors a court should consider "in determining the amount of reasonable compensation to be awarded" to a bankruptcy professional. But § 330(a)(3), by its plain terms, addresses only the *amount* of compensation for authorized services. It says nothing about what *types* of services are compensable. That question is addressed by § 330(a)(1) (and §§ 327 and 328), which does not authorize the fee-shifting that petitioners seek.

Furthermore, in a plain acknowledgement that there is no sound policy argument for awarding fees-on-fees for *unsuccessful* fee applicants, both petitioners and the Government attempt to convert § 330(a) into a prevailing-party statute. But § 330(a) will not bear such a construction. Unlike statutes that expressly overturn the American Rule for lawyers who prevail in certain types of adverse litigation, §§ 327(a) and 330(a) create a regime that covers *all* professionals and aims to compensate them for services rendered in assisting the trustee. Reading a prevailing-party requirement into § 330(a) would ignore the unique nature of bankruptcy proceedings and produce anomalous results.

In all events, petitioners' and the Government's policy arguments about "dilution" and "parity" are wholly without merit. "Parity" between bankruptcy and non-bankruptcy professionals is achieved by *precluding* fee-litigation fees because that is the default rule outside bankruptcy. A non-bankruptcy lawyer or accountant who ends up in litigation with a client over fees does not then get to send the client a bill for the cost of that litigation. Likewise as to "dilution," non-bankruptcy lawyers often face *greater* risks of non-payment and clients disputing bills.

And petitioners' suggestion that the Fifth Circuit's rule will deter lawyers from pursuing bankruptcy work blinks reality. Petitioners were paid $120 million for their work (at rates in excess of what they often receive outside bankruptcy), and they were paid on time as the case proceeded. They were also paid for preparing the fee application, something that few non-bankruptcy lawyers enjoy. Needless to say, it is unlikely that Baker Botts or any other law firm will exit the bankruptcy business

if denied fees-on-fees. And finally, as with other areas of the law, adequate safeguards exist to prevent *undue* dilution of fee awards caused by bad-faith objections or other litigation misconduct. The American Rule has its critics, but it has stood the test of time and reflects our system's default rule for properly allocating responsibility for litigation costs. By honoring the American Rule, the Fifth Circuit adhered to the text of § 330(a)(1) and provided all parties with the proper incentives going forward.

ARGUMENT

I. Section 330(a) Of The Bankruptcy Code Does Not Authorize Fees For Fee Litigation.

"The starting point in discerning congressional intent is the existing statutory text." *Lamie* v. *U.S. Trustee*, 540 U.S. 526, 534 (2004). The Court looks "to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997). That should also be the "end" here, *Octane Fitness, LLC* v. *ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1755 (2014), as the Code provides a framework for compensating *all* bankruptcy professionals for providing services to the estate that cannot be read to authorize attorneys' fees for litigating fee disputes against the estate.

Sections 327(a) and 330(a)(1) work together to authorize "reasonable compensation for...necessary services rendered by" various types of professionals hired to assist the trustee. The key terms in these provisions make clear that compensation is permitted only for professionals' services performed *for others*, and only for assisting the trustee with its duties. *Nothing* in these provisions authorizes fees for attor-

neys' self-interested work litigating their fees adverse to the estate. Such fee litigation also squarely implicates the American Rule, which directs that litigants bear their own fees absent an express statutory authorization that is plainly lacking here.

A. The Code's text does not expressly authorize fees for fee litigation.

1. Section 330(a) creates a limited compensation scheme that does not include adverse litigation over fees.

a. Section 327(a) authorizes the appointment of a wide variety of professionals to "represent or assist the trustee in carrying out *the trustee's duties* under" the Code. § 327(a) (emphasis added). It makes clear that those professionals may not hold an "interest adverse to the estate," a prohibition reinforced by § 328(c)'s statement that compensation may be disallowed if a professional develops an "interest adverse" to the estate. Section 330(a)(1), in turn, authorizes "reasonable compensation for...necessary services rendered by" a professional employed under § 327(a).

Sections 327(a) and 330(a)(1) must be read together in analyzing what compensation is authorized for § 327(a) professionals. Section 330(a)(1) expressly references § 327(a) and makes clear § 327(a) professionals get paid for their work *under § 327(a)*. This Court has observed that these provisions should be "taken together," in holding attorneys can receive compensation under § 330(a) only if employed under § 327(a). *Lamie*, 540 U.S. at 534, 537. Similarly, the scope of a professional's employment under § 327(a) is key to understanding what services are compensable under § 330(a)(1). *E.g.*, *Branch* v. *Smith*, 538 U.S. 254, 281 (2003); cf. *Beecham* v. *United States*,

511 U.S. 368, 372 (1994) ("The plain meaning that we seek to discern is the plain meaning of the whole statute, not of isolated sentences.").

Especially when read in light of § 327(a), § 330(a)(1) makes clear that Congress's authorization of compensation for bankruptcy professionals does not extend to self-interested fees-on-fees work. Several aspects of § 330(a)(1) underscore that this provision covers only work performed *for others*.

First, as the Government correctly recognizes, US.Br.31-34, the word "services" in § 330(a)(1) plainly refers to work performed for others. See Webster's New International Dictionary 2288 (2d ed. 1934) ("labor performed for another" or "conduct contributing to the advantage of another or others"); Oxford English Dictionary 517 (1st ed. 1933) ("action of serving, helping, or benefiting; conduct tending to the welfare or advantage of another"); see also Black's Law Dictionary 1607 (3d ed. 1933) ("duty or labor to be rendered by one person to another").[6] The word "rendered" in § 330(a)(1) also signifies work performed for others because to "render" means to "contribute; as to *render* assistance to one." 1934 Webster's 2109.

A straightforward reading of the statutory text thus shows that § 330(a)(1) authorizes compensation

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[6] The words "reasonable compensation for...services rendered" were introduced in the 1934 amendments to the Bankruptcy Act of 1898. See Act of June 7, 1934, ch. 424, sec. 77B(c)(8), 48 Stat. 911, 917 (1934); see also Chandler Act, ch. 575, ch. X, art. XII, secs. 241-45, 52 Stat. 840, 900-01 (1938). "[N]ecessary" was added in 1978. See Act to Establish a Uniform Law on the Subject of Bankruptcies, Pub. L. No. 95-598, tit. II, ch. I, sec. 330, 92 Stat. 2549 (1978) ("1978 Act").

only for professionals' work *done for others*. See, *e.g.*, *Woods* v. *City Nat'l Bank & Trust Co.*, 312 U.S. 262, 268 (1941) (phrase "'reasonable compensation for services rendered' necessarily implies loyal and disinterested service in the interest of" a client).

b. When bankruptcy attorneys perform purely self-interested work, they cannot be said to be rendering services for others. Specifically in the fees-on-fees context, it is illogical to say attorneys who have shifted to adversarial litigation *representing themselves against the bankruptcy estate* are performing work "for another," never mind "disinterested service" that is not "adverse to the estate." "It is simply not in accord with English usage to give [this text] a meaning that covers" such self-interested work. *Whitfield* v. *United States*, 2015 WL 144680, at *3 (U.S. 2015). Section 330(a)(1) clearly authorizes compensation only for "services rendered" for others in the underlying bankruptcy case. See US.Br.31-34.

Additionally, § 330(a)(1)'s "reasonable compensation for...services rendered by" § 327(a) professionals can only be for work done *under § 327(a)*. Cf. *Lamie*, 540 U.S. at 534, 537-38. When an attorney is engaged in self-interested work to defend his fees, he is not "represent[ing] or assist[ing] the trustee in carrying out the trustee's duties." To the contrary, he is litigating *adverse to the estate that the trustee serves*.

That plain-text reading of the statute is buttressed by the fact that §§ 327(a) and 330(a)(1) apply to both attorneys and non-attorney professionals, such as auditors and accountants. For example, if an accountant were hired by a trustee to perform services for the estate but then wound up in fee litigation, the accountant presumably would hire a lawyer to represent her in the litigation. It would be ab-

surd to suggest that the accountant's lawyers were performing compensable services under § 330(a)(1): they were not retained to represent the trustee under § 327(a), and their work would not constitute "services rendered" to the trustee under § 330(a)(1). Those lawyers would be serving only the accountant's interests, which are *directly at odds* with the interests of the bankruptcy estate.

The outcome should be no different just because attorney-professionals can litigate fee fights themselves. The services a law firm "renders" to itself in a fee dispute are performed solely for its own benefit and do not assist the trustee or benefit the estate. Indeed, if Baker Botts had attempted to hire outside counsel to represent it in the fee fight, that counsel could not receive compensation under §§ 327(a) and 330(a)(1) unless independently appointed by the trustee. And it is difficult to imagine how a trustee would practically—or could legally under § 327(a)—approve the engagement of a law firm solely to pursue litigation adverse to the estate. There is no reason for a different result just because Baker Botts' attorneys can shift over into adverse fee litigation without the intervening approval of the trustee. There is no question that, at the point attorneys start litigating a fee dispute for their exclusive benefit, they are no longer providing services to the trustee or acting without an "interest adverse to the estate." §§ 327(a), 328(c).

Finally, Congress's direction in § 330(a)(1) that only "necessary" services are compensable further excludes fees-on-fees work. The word "necessary" must be read in light of "the end sought," Black's Law Dictionary 1181 (4th ed. 1968), which means it must be understood in light of the scope of profes-

sionals' obligations under § 327(a). Cf. *Lamie*, 540 U.S. at 537-38. For a § 327(a) professional, it strains credulity to suggest that adversarial fee litigation—which, if successful, would diminish the value of the estate—is somehow "necessary" to assist the trustee with the performance of its duties. Fees-on-fees work cannot be considered "necessary services rendered" without torturing the words in § 330(a)(1).

2. The American Rule forecloses any argument for "fee-shifting" under § 330(a).

Any doubt about whether § 330(a) authorizes the fee-litigation fees that petitioners seek is removed by the American Rule, under which a "prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 247 (1975). The American Rule is a "bedrock principle" "deeply rooted in our history and in congressional policy." *Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252-53 (2010); *Alyeska*, 421 U.S. at 271; accord *Fox* v. *Vice*, 131 S. Ct. 2205, 2213 (2011).

A litigant can recover fees only if it invokes an exception to the American Rule, such as a specific statute allowing fee-shifting or a finding of bad-faith litigation conduct. *Alyeska*, 421 U.S. at 257-59. Courts may not create additional exceptions because they lack authority to "invade the legislature's province by redistributing litigation costs." *Id.* at 271; accord *id.* at 260-61, 263, 269-71. Further, ambiguous statutory language does not suffice; fees are not recoverable "absent explicit congressional authorization" evidencing that "Congress intended to set aside this long-standing American rule of law." *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 814-15 (1994) (internal quotation marks omitted).

As petitioners acknowledge, the American Rule applies in bankruptcy. Pet.Br.40; accord *Alyeska*, 421 U.S. at 260 n.33. And petitioners do not (and cannot) deny that it applies to fee litigation. See, *e.g.*, *In re Frazin*, 413 B.R. 378, 400 (Bankr. N.D. Tex. 2009), aff'd in part, rev'd in part, 732 F.3d 313 (5th Cir. 2013); *In re Brous*, 370 B.R. 563, 572 (S.D.N.Y. 2007). The American Rule reflects a strong default rule that each side bears its own litigation fees, in contradistinction from the "loser pays" rule that some foreign nations employ.

Yet *nothing* in § 330(a)(1) expressly authorizes fees for attorneys engaged in litigation adverse to the estate. Sections 327(a) and 330(a)(1) are not fee-shifting statutes and do not address attorneys' fees distinctly. Instead, they provide compensation for all professionals for services rendered *to assist the trustee*, which includes accountants' reports as well as litigation services that attorneys render on behalf of the trustee. But self-interested fee litigation by attorneys is altogether different, shifting the attorney from hired representative of the trustee to a litigant acting for his own benefit, adverse to the estate. That role fully implicates the American Rule. Petitioners need an express authorization to recover fees from such litigation; nothing in § 330(a) comes close.

Petitioners pretend the American Rule is an on/off switch that is turned off when *any* fee provision exists; that is, they suggest that once Congress authorized *some* fees in § 330(a), the American Rule disappeared entirely. Pet.Br.40-43. But this Court has made clear that, because of the American Rule, deciding if fees are allowed requires parsing the words Congress uses. See *Hardt*, 560 U.S. at 253-54; *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 174

(2009).[7] Congress sometimes broadly authorizes "a reasonable attorney's fee" that covers all fees, see *infra* Part I.C, but here its authorization is not specific to attorneys' fees and clearly "limit[s] the services for which compensation may be sought," US.Br.6—contrary to petitioners' claims that § 330(a) does not specify compensable "services" or "tasks," Pet.Br.7, 33, 43. Under the American Rule, Congress must expressly indicate its intent to allow fee-shifting, and Congress's authorizing terms must be honored. See *In re Crescent City Estates, LLC*, 588 F.3d 822, 825-26 (4th Cir. 2009). The presumption of the American Rule is at least as strong as other presumptions that do not wholly expire when some degree of deviation from the default rule has occurred. See, *e.g.*, *Morrison* v. *Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255, 265 (2010) (presumption against extraterritoriality means statutes must clearly indicate extraterritorial application, *but also* "when a statute provides for some extraterritorial application, the presumption...operates to limit that provision to its terms").[8]

The Government apparently forgot about the American Rule, while seeking a "judicial exception"

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[7] Petitioners rely on *Alyeska*'s citation to a provision of the Bankruptcy Act of 1898 (which § 330(a) has replaced) as an example of an explicit fee authorization. Pet.Br.40. But *Alyeska* made plain "[t]hese statutory allowances...differ considerably among themselves." 421 U.S. at 260-61.

[8] Indeed, "Congress legislates against the strong background of the American Rule," and "[s]tatutes which invade the common law...are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 533-34 (1994) (internal quotation marks omitted).

allowing fees-on-fees. US.Br.15 n.7; accord 78 Fed. Reg. 36,248, at 36,250, 36,269, 36,271 (June 17, 2013) (fee guidelines for large Chapter 11 cases) ("Guidelines"). The Government's silence is curious given its heavy reliance below on the American Rule. C.A.Rec.282. Regardless, this Court has recognized "judicial exceptions" to the American Rule *only* in response to litigation misconduct, given courts' inherent authority over the course of litigation. *Alyeska*, 421 U.S. at 257-59. The Government's request for another, wholly different "judicial exception" contravenes this Court's precedent making clear that Congress has not "extended any roving authority to the Judiciary to allow counsel fees...whenever the courts might deem them warranted." *Id.* at 260.

3. Petitioners' and the Government's positions disregard § 330(a)(1)'s text.

Petitioners essentially ignore § 327(a) and rarely acknowledge § 330(a)(1)'s full text, instead selectively quoting "reasonable compensation" in isolation. Pet.Br.4, 6, 17, 21, 39-41. They quote the text in passing, but engage in no serious analysis of what the key terms in § 330(a)(1) mean.[9] Pet.Br.20-22.

Importantly, the Government rejects petitioners' textual analysis, agreeing that § 330(a)(1) provides a "limited" authorization of fees and specifically that § 330(a)(1)'s "services rendered" clause covers only

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[9] Petitioners' indifference to text allows them to find *Octane* controlling. Pet.Br.22, 33. Petitioners ignore that § 330(a)(1)'s text is different from 35 U.S.C. § 285, which is a fee-shifting statute. See *infra* Part I.C. Nothing in the Fifth Circuit's ruling creates an "extra-textual" limitation on fees as petitioners claim. Pet.Br.21, 33-34, 38. Its ruling simply gives effect to the *textual* limitations Congress imposed.

services "performed in the underlying bankruptcy case," and *not* fee-litigation work. US.Br.6, 13-14, 25, 31-34. Nonetheless, the Government claims fees-on-fees should be awarded as needed to avoid "dilution" of base fees. US.Br.14-20. This "dilution" concern is wrong on its terms, see *infra* Part II.A, but is *legally* indefensible as well.

First, this position defies § 330(a)'s text. The Government argues that fees-on-fees are merely "a component of 'reasonable compensation' for [the] underlying services." US.Br.15, 18, 33. But § 330(a)(1) authorizes "reasonable compensation *for...necessary services rendered by*" a professional. The compensation must be tied to the "services rendered," unless one reads the word "for" (and the words that follow) out of the statute. Because the Government agrees fees-on-fees work is not a "service[] rendered" under § 330(a)(1), there is no authority for awarding "reasonable compensation for" that *non-compensable* "service." The Government's view would allow "compensation for" *expressly non-compensable* services. Moreover, the Government ignores that § 330(a)(1), especially when read in light of §§ 327(a) and 328(c), does not treat adverse litigation over fees as an ordinary component of compensable fees. To the contrary, those provisions preclude an interpretation treating such adverse litigation fees as just another component of "reasonable compensation."[10]

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[10] The Government's view also runs counter to this Court's ruling in *Lamie* that attorneys can be compensated only if employed under § 327(a), 540 U.S. at 534, 537-38, which logically means they can be compensated only for services performed within § 327(a)'s scope of employment.

Second, the Government contravenes the American Rule by asking for a "judicial exception" based on an anti-dilution policy rationale. *E.g.*, US.Br.15 n.7, 18-19. The Guidelines—the stated basis for the Government's position here, US.Br.15 n.7—provide that "awarding compensation for matters related to a fee application after its initial preparation is generally inappropriate," except where the activities fall within a "judicial exception," such as where "the applicant substantially prevails." 78 Fed. Reg. at 36,250; see also *id.* at 36,269, 36,271, 36,275.

Such naked reliance on a "judicial exception" is doubly problematic. The need for a "judicial exception" confirms that § 330(a)'s text does not allow fees-on-fees, and the plea for a "judicial exception" beyond litigation misconduct ignores the well-established contours of the American Rule. See *supra* Part I.A.2. Indeed, the Government's anti-dilution rationale is not just an insufficient policy argument for ignoring the American Rule, but is essentially an argument against the American Rule itself, as attorneys' fees "dilute" amounts recovered by prevailing parties *whenever* disputes are litigated. If the possibility of dilution alone could justify fees-on-fees, fee-shifting would be the norm. But the American Rule presumes exactly the opposite. Cf. *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 408 (1990).

Third, the Government's position lacks credibility given its dramatic shift *in this case*. It acknowledges having argued below that fees-on-fees are disallowed "in all circumstances." US.Br.15 n.7. And, other than saying "reasonable compensation" can somehow be obtained "for" *non-compensable* "services," the Government has not wavered in its statutory view that fees-on-fees work is non-compensable.

But its changes of position on policy—with the same Trustee officials on both sets of briefs—are startling. See C.A.Rec.278-86, 344-46. For example:

- Below, the Government faulted the bankruptcy court for "bas[ing] its decision on two policy arguments" (including "dilution"), arguing the court "lacked authority to award fees on...policy grounds." C.A.Rec.282. Where fees are "incurred while successfully litigating against the estate," as opposed to "work...performed for the estate," the Government argued "the bankruptcy court's order is in the nature of a fee-shifting award." *Ibid.* After surveying American Rule precedent, the Government concluded that "the bankruptcy court's fee-shifting award is precluded by *Alyeska*." C.A.Rec.282-85.

- Further, the Government disputed the contention that "denying [fees-on-fees] would unfairly dilute...fees." C.A.Rec.345. It explained: "a bankruptcy professional should not be able to demand fees from a client that are unavailable outside of bankruptcy," and "requiring a professional to bear the normal litigation costs of litigating a contested request for payment...dilutes a bankruptcy fee award no more than any other litigation over professional fees." *Ibid.*

These are just highlights. The Government's prior arguments were made in the course of objecting to fees for pursuing a fee enhancement. US.Br.15 n.7. But its lead argument for disallowing those fees was that "the better-reasoned view" as to "whether a professional can even recover fees and expenses for prosecuting a fee application" is "that such an award

is generally precluded by the plain text of the Bankruptcy Code." C.A.Rec.278-81.

The Government points to the Guidelines as the reason for its about-face, US.Br.15 n.7, but the Guidelines do nothing to change the force of eminently correct statutory and policy arguments the Government embraced below. In any event, the rapidity with which the Government has changed its tune is a cautionary tale on relying on policy arguments in lieu of statutory text and the American Rule, which are both rooted in firmer soil.

4. Other § 330(a) provisions reinforce that fees for fee litigation are not authorized.

While §§ 327(a) and 330(a)(1) alone dictate that fee-litigation fees are non-compensable, other parts of § 330(a) buttress that view.

a. *Section 330(a)(4) ensures fee-litigation fees are non-compensable.*

Even if somehow compensable under § 330(a)(1), fees-on-fees would be barred by § 330(a)(4). Section 330(a)(4) provides that a court "shall not allow compensation for" services that were not "(i) reasonably likely to benefit the debtor's estate; or (ii) necessary to the administration of the case."[11]

i. Petitioners barely mention the "benefit the...estate" element of § 330(a)(4), and for good rea-

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[11] In responding to comments regarding the Guidelines, the Trustee maintained that fee-litigation work is neither beneficial to the estate nor necessary to the case under § 330(a)(4)(A)(ii). 78 Fed. Reg. at 36,269. The Government never refutes that view and appears to agree with the Fifth Circuit on § 330(a)(4) insofar as fees-on-fees are not "independently compensable." US.Br.24-25.

son. As the Trustee has explained, "time spent...explaining the fees, negotiating objections, and litigating contested fee matters...are properly characterized as work that is for the benefit of the professional and not the estate." 78 Fed. Reg. at 36,250; see also C.A.Rec.279-80. Fee-litigation work "benefits" *only* the attorneys and has the ultimate goal of *diminishing* the "estate." § 330(a)(4); see *Grant* v. *George Schumann Tire & Battery Co.*, 908 F.2d 874, 883 (11th Cir. 1990).

To argue otherwise, petitioners resort to an indirect-benefits theory that renders § 330(a)(4)(A)(ii)(I) limitless. They claim allowing fees-on-fees would ("general[ly]") benefit the bankruptcy system by attracting competent counsel, which "indirectly [benefits] each estate participating in the system." Pet.Br.25-26 (internal quotation marks omitted). That rationale would essentially replace "benefit the...estate" with "benefit the lawyers" and allow compensation for anything that puts more money in the lawyers' (or other § 327(a) professionals') pockets. But § 330(a)(4) requires that "*services*" "benefit the...estate," which mandates a far more direct connection. Petitioners suggest estates have an "interest" in knowing how much to pay professionals. Pet.Br.26. Saying § 330(a)(4) allows an attorney to *diminish* the estate by using its funds on self-interested fees, because the estate "benefits" from knowing exactly how much it has been harmed, is—to put it mildly—an odd construction of "benefit."

ii. Likewise, petitioners' contention that fees-on-fees work is "necessary to the administration of the case" would render § 330(a)(4)(A)(ii)(II) meaningless as a limit on compensation. Pet.Br.25. Petitioners again claim fee-litigation work is "necessary" be-

cause the trustee needs to know how much to charge the estate, but that would make *anything* conceivably chargeable to the estate "necessary." However "necessary" an attorney feels it is to pursue fees and engage in litigation against the estate, that does not make it "necessary *to the administration of the case.*"

Petitioners' "necessary" argument tries to blur the distinction between preparing and defending fee applications. Pet.Br.25. But one can conclude preparing fee applications is "necessary" to the case while defending them is not, particularly because of § 330(a)(6). See *infra* Part I.A.4.b. Fee-application preparation is "necessary" for the straightforward reason that *the bankruptcy rules require it.* Fed. R. Bankr. P. 2016(a). That was true when Congress enacted §§ 330(a)(4) and 330(a)(6). Fed. R. Bankr. P. 2016(a) (1994). An application is thus required *by law* for professionals to be compensated. 78 Fed. Reg. at 36,250. But petitioners cannot plausibly contend that fee *litigation* is needed to close the case or that fee-litigation work adverse to the estate is somehow necessary to administration of the case.

iii. Petitioners argue § 330(a)(4)(A)(ii) should be read to make services compensable if they are *either* "beneficial" *or* "necessary." Pet.Br.7, 32-34, 37-38. The Court need not resolve this question, as fee-litigation work is neither beneficial nor necessary under § 330(a)(4).

Regardless, the better reading of § 330(a)(4) is that services are *"not"* compensable if they are either *not* beneficial or *not* necessary—i.e., they must be *both* beneficial and necessary to be compensable. Accord *Smith*, 317 F.3d at 926; C.A.Rec.279-80 (Government below). Section 330(a)(4)(A)'s "shall not allow compensation for" clause introduces multiple at-

tributes that independently make "services" *not* compensable. The provision uses the disjunctive "or" between the disqualifying attributes because it is framed in the negative, meaning it indicates that services falling in *any* prohibited category are non-compensable. As to § 330(a)(4)(A)(ii), services are non-compensable if they are "not" beneficial "or" necessary. Because the "or" follows "not," under settled interpretive rules, the provision means services are non-compensable if they are "not" beneficial and if they are "not" necessary. Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 119 (2012) (principle that not A or B means not A and not B).[12] This construction makes sense, too, ensuring that estates pay for only those services that are *both* necessary and beneficial.

b. *Section 330(a)(6) removes any doubt that fees for fee litigation are not authorized.*

i. Section 330(a)(6) provides that "[a]ny compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application." This provision eliminates any doubt as to whether fees incurred in preparing fee applications are compensable. It resolves any such doubt with a qualified "yes": preparation work is compensable at a level commensurate with the relatively ministerial process of preparing

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[12] *Amicus* State Bar of Texas Bankruptcy Section purports to apply this principle (at 9-10), but it forgets that the word "not" appears twice in § 330(a)(4)(A)(ii) and it thus changes the meaning by divorcing the "shall *not* allow compensation" clause from the two "conditions" in its chart. There shall *not* be compensation for services that are not beneficial and there shall *not* be compensation for services that are not necessary.

an application. Yet *nothing* in § 330(a) expressly includes fee-litigation work.[13] It would violate bedrock principles of statutory construction and the long-established American Rule to conclude that fees associated with litigating a fee dispute are compensable in the absence of explicit authority. That is particularly true because preparation work is performed by all professionals and can readily be seen as the last step in providing necessary services, while fees for adversarial litigation fully implicate the American Rule's requirement of express statutory authorization. See *supra* Part I.A.2.

Petitioners and the Government miss the significance of § 330(a)(6) and the American Rule, framing the debate as whether § 330(a)(6) itself authorizes preparation fees or merely confirms they are authorized by § 330(a)(1). Pet.Br.30-31; US.Br.23-24. That is not the dispositive question. Whether or not § 330(a)(6) is a grant of authority, it reflects Congress's *express* intent to provide compensation for preparation work, while *nothing* does that for fees-on-fees work. See, *e.g.*, *In re CCT Commc'ns, Inc.*, 2010 WL 3386947, at *8 (Bankr. S.D.N.Y. 2010). That difference is dispositive under the American Rule and is enough to resolve the question here.[14]

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[13] Before the 1994 amendments that added § 330(a)(6), courts had split on whether both preparation and defense fees were recoverable, and in testimony before Congress, the American Bankruptcy Institute urged Congress to make both "expressly compensable." *In re Wireless Telecomms. Inc.*, 449 B.R. 228, 236 (Bankr. M.D. Pa. 2011) (internal quotation marks omitted). Yet Congress chose to expressly address only fee-application preparation in § 330(a)(6).

[14] Further, if the Court were to agree with the Government that time spent preparing fee applications is not a "ser-

ii. Even if § 330(a)(6) is read to confirm preparation work is compensable under § 330(a)(1) and (a)(4), that does not advance petitioners' cause for multiple reasons.

First, preparation services are distinguishable from fee-litigation work under § 330(a)'s text. While the heart of § 330(a)(1)'s authorization is for core bankruptcy work, accord US.Br.31, one can interpret that provision as including at its outer edge the *preparation* of fee applications, especially when read together with § 330(a)(6). A professional's discrete act of preparing a fee application for the trustee may be viewed as a "service rendered" for the trustee as part of the § 327(a) role. Indeed, for a § 327(a) professional hired to serve the trustee, completing the statutorily-required application can be considered the *last* "service rendered" for the trustee. It is comparable to a person having a dealer repair a car and prepare an itemized bill listing the work performed; the bill is the final service rendered and marks the completion of the requested task. But in no sense

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vice rendered" under § 330(a)(1), US.Br.32-33, yet disagree with the Government's policy-based argument that preparation work is nonetheless compensable under § 330(a)(1) to avoid "dilution," then nothing *but* § 330(a)(6) authorizes fees for preparing fee applications. In that event, while § 330(a)(6)'s text may not be the most natural language for authorizing something new, it must be read as authorizing preparation work in order to make sense of § 330(a) as a whole. Cf. *Lamie*, 540 U.S. at 534-36 (recognizing Congress's work *in § 330(a)* was "awkward" and "ungrammatical," but giving effect to text, even with "surplusage"). Some courts and commentators have referred to § 330(a)(6) as providing for fees for preparation work. *E.g.*, *Boyd* v. *Engman*, 404 B.R. 467, 482 (W.D. Mich. 2009); 3 Collier ¶¶ 330.03[16][a][i], 330.LH[5]; accord C.A.Rec.279-81 (Government below); Pet.App.135a.

can ensuing adversarial litigation about payment be considered a "service rendered by" the professional for the trustee; the professional's pursuit of fees is purely for the professional's benefit. Accord US.Br.31-32; 78 Fed. Reg. at 36,250, 36,269.

Additionally, preparing fee applications is "necessary" within the meaning of § 330(a) (particularly in view of § 330(a)(6)), in that it is required by rule. Fed. R. Bankr. P. 2016(a). But petitioners cite nothing to suggest adversarial fees-on-fees work is required by law or is otherwise "necessary" within the meaning of § 330(a) and the limited scope of employment under § 327(a). See *supra* Part I.A.4.a.

Second, these services are distinct by nature. Fee-application preparation is a non-adversarial, ministerial conclusion to an engagement, as Congress recognized when it limited compensation for this task in § 330(a)(6). Self-interested fee disputes, adverse to the estate, are totally different. Petitioners' request for fees-on-fees goes an extra standard deviation beyond the core of § 330(a).

This conclusion is underscored by the fact that § 330(a) applies to all professionals. Preparation of fee applications, whether by lawyers or accountants, is a necessary part of providing services for the trustee, but that process is a far cry from adversarial litigation over fees—as seen most starkly in the context of a non-lawyer professional. There is an obvious difference between compensating an accountant for a fee application governing accounting services, and compensating the accountant's lawyers for litigating a challenge to those fees.

Third, petitioners' reliance on "parity" works against them here. "Fee applications...have no coun-

terpart in most areas of legal practice." *In re St. Rita's Assocs. Private Placement*, 260 B.R. 650, 652 (Bankr. W.D.N.Y. 2001). "In contrast, fee disputes are common to all areas of legal practice," and outside bankruptcy the American Rule generally requires each side to bear its fees. *Ibid.* The Government recognizes all of this. 78 Fed. Reg. at 36,250, 36,269; cf. US.Br.25-26. "Parity" differentiates these services, supporting compensation only for preparation work.

Given the Government's prior recognition of most of these meaningful distinctions, its unexplained claim of "no apparent reason to conclude" that the services should be treated differently reeks of willful blindness. US.Br.13, 23.

iii. Petitioners and the Government invoke *Commissioner, INS* v. *Jean*, and the Court's statement that it perceived "no textual or logical argument" to distinguish fee-application preparation and defense work under the Equal Access to Justice Act's (EAJA) fee-shifting provision. 496 U.S. 154, 162 (1990) (addressing 28 U.S.C. § 2412(d)). Their reliance is wholly off-base. The EAJA provision is a broad fee-shifting statute with a different textual authorization than § 330(a)(1), as it open-endedly authorizes "fees" to the "prevailing" party in litigation. See *infra* Part I.C. *Everyone* in *Jean* conceded fees-on-fees were within that *express* authorization for fees. 496 U.S. at 162. The only question was what showing was needed to get those fees. *Ibid.* Because that fee provision allowed fees only if the Government's position was "not substantially justified," the Government argued plaintiffs could not get fees-on-fees unless its position in the fee litigation itself—and not just in the underlying dispute—was "not

substantially justified." *Id.* at 157. The Court rejected that argument, holding fees-on-fees may be awarded without a second "not substantially justified" finding. *Id.* at 165-66.

The Court's statement about distinguishing between preparation and defense of fee applications came in the context of answering that narrow question, with the Court finding no reason to have a different trigger for *authorized* preparation work and *authorized* fee-litigation work. *Id.* at 161-62. Here, though, the question is whether fees-on-fees are authorized at all. And, unlike a typical fee-shifting statute, there are ample textual bases in § 330(a) for distinguishing fee-preparation and fee-defense work. Not only does § 330(a)(6) reference only the former, but as explained above, the text of §§ 330(a)(1), 330(a)(4), 327(a), and 328(c) all provide bases for distinguishing between preparation work—which can be seen as the last service rendered to the trustee for the benefit of the estate—and fee-defense work. So unlike the EAJA in *Jean*, there are "textual" reasons for treating these services differently. And there are "logical" reasons for doing so as well, because of the unique bankruptcy context and the force of the American Rule.

c. *Section 330(a)(3)'s factors confirm the Fifth Circuit's ruling.*

Rather than analyze what § 330(a)(1) *authorizes* or § 330(a)(4) *excludes*, petitioners rely heavily on § 330(a)(3). Pet.Br.17-18, 23-30. But § 330(a)(3) outlines "factors" courts consider "[i]n determining the amount of reasonable compensation" to award. By its terms, § 330(a)(3) comes into play to determine the "amount" of compensation only *after* a court has determined services are compensable under

§§ 327(a) and 330(a)(1). Section 330(a)(3)'s factors are irrelevant if services are non-compensable. Petitioners' use of § 330(a)(3) to determine what fees are authorized in the first place is mistaken.

This over-emphasis on § 330(a)(3) leads petitioners to wrongly accuse the Fifth Circuit of mixing the words "case" and "estate" in § 330(a). Pet.Br.23-25. They even try linking this to Congress's shift from an "economy of the estate" view, suggesting the Fifth Circuit missed that change in requiring that all services benefit the "estate." Pet.Br.23-25, 27, 34-39. As the Government agrees, US.Br.10, 24-25, that part of the Fifth Circuit's opinion held fees-on-fees work is not compensable *under § 330(a)(4)*—which says "benefit the...*estate*." See Pet.App.15a (emphasis added). Further, the court recognized the departure from "economy of the estate," Pet.App.18a, and nothing in its opinion harkens back to that era.

Petitioners' analysis of the factors is also off-base. They rely heavily on § 330(a)(3)(F)'s comparability factor, which addresses whether "the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners" in non-bankruptcy cases. They miss that parity is achieved by *refusing* fees-on-fees in bankruptcy, see *infra* Part II.A.1, which demonstrates that the comparability factor supports the Fifth Circuit's rule. Regardless, there is no *textual* support for petitioners' attempt to take one factor from § 330(a)(3)'s list and crown it supreme for deciding what § 330(a) authorizes. It is not remotely an "express" *authorization* of fees-on-fees; it is merely one factor for determining a fee *amount*.

Petitioners also focus on § 330(a)(3)(C)'s factor addressing whether services are necessary and bene-

ficial to the case. Pet.Br.23-26. As explained above, fees-on-fees work is barred by § 330(a)(4) because it does not benefit the estate and is not necessary to the case. The same analysis dictates that such work is not necessary to the case under § 330(a)(3)(C), and it is not clear how services that do not "benefit the...estate" and are not "necessary" to the case can nonetheless be "beneficial" to the case.

* * *

In sum, § 330(a)'s limited authorization for fees cannot be read to include fees-on-fees. Petitioners try to couch their arguments in textual terms, but are really left with policy pleas. Similarly, the Ninth Circuit and other courts adopting petitioners' position have recognized that § 330(a) is, at most, "silent" about fees-on-fees. *Smith*, 317 F.3d at 928; see, *e.g.*, *CCT Commc'ns*, 2010 WL 3386947, at *8-9. Yet the Ninth Circuit followed Judge Reinhardt's "dilution" rationale in *In re Nucorp Energy, Inc.*, 764 F.2d 655, 660-61 (9th Cir. 1985), indulging policy to allow fees-on-fees. This approach invades the province of Congress in violation of the American Rule, and is contrary to basic statutory-interpretation principles. The Court should defer to Congress and enforce the text as written. *Lamie*, 540 U.S. at 538, 542.

B. Petitioners' and the Government's views would allow fees for *unsuccessful* fee defenses and other collateral fees.

Further proof that petitioners' and the Government's positions are wrong is that they lead to impractical, indeed absurd, results. *E.g.*, *McNeill* v. *United States*, 131 S. Ct. 2218, 2223 (2011).

1. As the Government explains, petitioners' textual argument would allow fees-on-fees *regardless* of

whether the fee applicant is successful. US.Br.32-33. Petitioners believe fees-on-fees work is a "necessary service[] rendered" under § 330(a)(1) that satisfies § 330(a)(4) as *either* necessary *or* beneficial because it informs the trustee what the estate owes. Pet.Br.22-26. If so, nothing in § 330(a)(1) limits fees-on-fees based on success, and the § 330(a)(4) argument would be true regardless of whether a fee applicant succeeds. US.Br.33 & n.12. That petitioners' reading would allow the absurdity of awarding fees-on-fees, even where the base fees are not compensable, proves their interpretation is untenable.

The words "reasonable compensation" do not help petitioners avoid this result. Their position is that fee-litigation work is *itself* a compensable service. If that is correct, then determining "reasonable compensation for" that "service" merely goes to the amount of fees, as there is no hint of a prevailing-party *requirement* in § 330(a)(3). Indeed, imposing a success requirement through the "reasonable compensation" language would be disastrous for bankruptcy professionals because it would necessarily apply across the board—to all compensable "services"—in undifferentiated fashion.[15] Allowing as "reasonable" only compensation for successful services would turn *all* bankruptcy professionals into

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[15] In specific cases, courts may go beyond the § 330(a)(3) factors and exercise discretion to refuse compensation for unsuccessful fees-on-fees work. But petitioners cannot deny that, under their "reading" of the text, nothing in the statute *precludes* a court from awarding such compensation.

contingency-fee actors, which is obviously not what Congress intended.[16]

Nor is the Government entirely immune from this problem. It apparently crafted its legal justification to achieve its desired substantially-prevails result, tying fees-on-fees to the compensation for underlying services. But in doing so, it advocates a hindsight-based rule for awarding "reasonable compensation" that is similar to the one it opposes for judging whether services are beneficial or necessary. See US.Br.33 n.12; Supp. Br. of Trustee on Reh'g En Banc at 10-16, 2015 WL 136284, *In re Woerner*, 771 F.3d 820 (5th Cir. 2014) (No. 13-50075). And its strained effort to make the text fit a prevailing-party rule is implausible. Any argument that § 330(a) compensates only for successful fee fights has no mooring in the statute.

2. Additionally, under petitioners' and the Government's arguments, there is no way to distinguish fees-on-fees from fees incurred seeking enhancements or other collateral fees incurred in conceivably endless litigation over a proper fee amount. Petitioners sought fees-on-fee-enhancements below and argued there is no principled basis for distinguishing them from fees-on-fees. Sealed.C.A.Rec.208. If fees-on-fees work is a "necessary service[] rendered" and is "necessary" and "beneficial" because it lets the trustee know how much to charge the estate, *any* collateral work would be as well—fees-on-fee-enhancements, appellate fees, and more.

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[16] Reading a contingency-fee requirement into § 330(a) would also conflict with § 328(a), which allows professionals to contract for contingency fees as an alternative to § 330(a).

The Government objected below to enhancement-related fees, C.A.Rec.278-86, but now contradicts that by adopting the rationale that collateral fees are allowed to avoid dilution of underlying fees. If an enhancement is proper under § 330(a), the anti-dilution rationale logically allows fees spent pursuing the enhancement. The Government offers nothing to avoid this result. Given the Court's caution about enhancements even under open-ended fee provisions like 42 U.S.C. § 1988, *Perdue* v. *Kenny A. ex rel. Winn*, 559 U.S. 542, 550-60 (2010), positions allowing *fees-on*-fee-enhancements go the wrong way.

C. The comparison to fee-shifting statutes is misplaced.

Petitioners' and the Government's myopic focus on "reasonable compensation" leads them to compare § 330(a) to fee-shifting statutes. But the comparison actually proves § 330(a) is nothing like the kind of fee-shifting statutes that focus on attorneys' fees and prevailing parties, and that demonstrate the kind of clarity needed to reverse the American Rule.

1. For one thing, petitioners and the Government disregard this Court's precedent by ignoring *text* when comparing § 330(a) to fee-shifting statutes. Where "statutory deviations from the American Rule" differ in their language, an interpretation of one does not control another. *Hardt*, 560 U.S. at 253-54. Thus, interpretations of prevailing-party statutes do not govern statutes lacking prevailing-party text. *Ibid.* Courts should "not...apply rules applicable under one statute to a different statute without careful and critical examination." *Gross*, 557 U.S. at 174 (internal quotation marks omitted).

Yet petitioners treat the statutes as virtually fungible, asserting the fee-shifting statutes have language "similar to" or "like" § 330(a)—without analysis. Pet.Br.40-41. And the Government's claim that fee-shifting provisions are "highly instructive" for construing § 330(a), US.Br.12, without attempting to compare the text, is akin to treating all arbitration or preemption clauses the same regardless of their language—contrary to this Court's precedent. See, *e.g.*, *Volt Info. Scis., Inc.* v. *Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989); *Gade* v. *Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring).

2. Petitioners' and the Government's disregard for text leads them to miss that their cited statutes use similar language that is nothing like § 330(a). Specifically, all the fee-shifting statutes that petitioners and the Government cite broadly authorize "a reasonable attorney's fee"—or "fees" or "reasonable attorney fees" or "reasonable litigation costs"—almost always to a prevailing party, for pursuing *an adversarial action*. See 42 U.S.C. § 1988(b); 28 U.S.C. § 2412(d); Pet.Br.40-43 & n.13; US.Br.19-20. Section 330(a)'s authorization differs from these fee-shifting statutes in several key respects.

First, § 330(a) has no prevailing-party element; *nothing* hints at a loser-pays regime. That omission is hardly surprising. In the bankruptcy context—unlike the civil-rights context—attorneys are representing the trustee, and there will not be well-defined "losers" and "winners" for purposes of allocating fees. Section 330(a) authorizes fees for services rendered with no prevailing-party trigger.

Second, § 330(a) is not a specialized provision for attorneys, but instead addresses compensation for all

professionals. That undercuts the notion that § 330(a) somehow abrogates the American Rule *for attorneys* for litigation adverse to the estate.

Third, Congress did not broadly authorize a "reasonable attorney's fee" in § 330(a); rather, it provided a limited authorization of fees for specific *services*. See *supra* Part I.A. This Court has observed that a broad, open-ended statutory authorization for "fees...incurred" in a "civil action" is for all aspects of the designated action, including fees-on-fees.[17] *Jean*, 496 U.S. at 161-62. Yet Congress did not use such broad language in § 330(a). As the Government admits, fees-on-fees work is *not* a "service[] rendered" in § 330(a)(1); that express grant is only for the underlying bankruptcy work. US.Br.31-33.

Congress's decision to use narrower language in authorizing compensation under § 330(a) is particularly significant given the fact that, elsewhere in the Code, Congress more broadly authorized "reasonable attorneys' fees" or a "reasonable attorney's fee." *E.g.*, 11 U.S.C. §§ 110(i), 523(d). These provisions operate as fee-shifting statutes, awarding *attorneys'* fees to *prevailing* parties from other parties (not the estate) after *adversarial proceedings* that arise in bankruptcy. *Ibid.* That Congress provided for fee-shifting elsewhere in the Code confirms that its more limited authorization in § 330(a)(1) was a deliberate decision not to enact a fee-shifting regime for professionals.

To gloss over these textual differences, petitioners just repeat that § 330(a)(1) allows "reasonable

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[17] The fee-shifting statutes do not authorize fees-on-fees *by name*, Pet.Br.40-43; US.Br.19, but that is not the point. The express grants of authority in those statutes are broad enough to encompass fees-on-fees work.

compensation," Pet.Br.4, 39-44, apparently wanting the Court to think "reasonable compensation" sounds like "reasonable attorney's fee" and assume the comparison is apt. Similarly, the Government quotes *only* "reasonable" from the statutes to imply they are the same. US.Br.19-22. But as discussed at length above, § 330(a)(1) awards reasonable compensation only "for...necessary services rendered."

3. The textual distinctions between fee-shifting statutes and § 330(a) reflect important differences between the regimes Congress established.

The fee-shifting statutes address adversarial proceedings where there are two sides and one winner. In that context, and given policy objectives such as encouraging the vindication of certain constitutional or statutory rights, Pet.App.17a, Congress has used similar language from statute to statute, and concerns about dilution are apt because an attorney for a non-prevailing plaintiff may receive no compensation at all.

Section 330(a) creates a totally different regime. In bankruptcy, multiple parties have a stake in the outcome, and numerous professionals serve various interests. There is no fee "shifting" in § 330(a); it is a compensation scheme, using estate funds, for all professionals' services—whether those services are performed by lawyers, accountants, or auctioneers.

Nothing in § 330(a)(1) states that compensation turns on who prevailed or whether the services achieved success. For example, petitioners' ability to recover base fees for their work in the bankruptcy did not depend on ultimate success; they received compensation because they rendered services for the

trustee, on behalf of the estate. See, *e.g.*, *Grant*, 908 F.2d at 882-83.

The prevailing-party comparison is especially inapt because, in the usual bankruptcy, the "losing" objector would not directly pay the fees—the estate would foot the bill. This case is unusual because it was a full-pay case, making the objecting party the one that would bear the fees-on-fees. In most bankruptcies, however, there are insufficient estate funds to compensate all constituents, so estate stakeholders (typically creditors) will bear the cost. See *infra* Part II.B. But in such cases, the entities that "pay" for fees-on-fees often would not be the ones objecting. As the Fifth Circuit stated, "the equities are quite different" in bankruptcy.[18] Pet.App.17a.

Finally, the difference between the two regimes is underscored by §§ 327(a) and 328(c). Far from assuming adversarial litigation where the loser pays, those provisions forbid adverse interests between the professional seeking additional fees and the estate that will pay the additional fees. The typical fee-shifting statute designed for adversarial litigation, and the bankruptcy regime of §§ 327, 328, and 330(a), are truly apples and oranges.

4. Below, when contending *Perdue* did not control their fee-enhancement requests, petitioners recognized the *textual* differences between § 330(a) and

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[18] This is what the Fifth Circuit meant about "[n]o side wear[ing] the black hat," Pet.App.17a, which petitioners take out of context. The court also noted that fee-shifting encourages claims vindicating certain rights, to hold to account violators of federal law. Pet.App.17a; accord *Fox*, 131 S. Ct. at 2213; *Jean*, 496 U.S. at 163-65. The latter interests have no analogue in bankruptcy.

fee-shifting statutes. *E.g.*, C.A.Rec.319 (Jordan, Hyden: "almost universally recognized" § 330(a) "is not a fee shifting statute"); see Sealed.C.A.Rec.114-27; C.A.Rec.312-22. Baker Botts recognized that the text of § 330(a) differs markedly from § 1988; that § 330(a) creates a distinct statutory regime; and that § 330(a) is not a prevailing-party statute because it involves compensation by a beneficiary of services to an advisor, *not* shifting fees from a loser to a winner.[19] Sealed.C.A.Rec.115-17, 124-25. The fee-shifting statutes offer no support for petitioners or the Government.

II. Congress's Decision Not To Compensate For Fee-Litigation Work Under § 330(a) Advances Important Policy Objectives.

Taking a cue from the Ninth Circuit and other courts adopting their position, petitioners and *amici* emphasize policy arguments about "parity" and "dilution" above all else. Those arguments, of course, provide no basis for departing from the clear text of § 330(a), but they also fail on their own terms.

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[19] In the fee-enhancement context, where the question is what test to use in awarding enhancements, ASARCO analogized to *Perdue* because fee enhancements in bankruptcy cases have been guided by fee-shifting case law on enhancements. *E.g.*, Sealed.C.A.Rec.27-31. The courts below rejected that analogy, agreeing with petitioners' distinctions. There is certainly no cause for analogizing § 330(a) to fee-shifting statutes in the fees-on-fees context, where the question is what § 330(a) authorizes, and the textual limitations described above make the fee-shifting statutes inapposite.

A. The Fifth Circuit's rule achieves Congress's desire for parity.

1. Refusing fees for fee litigation treats bankruptcy and non-bankruptcy lawyers the same.

a. While petitioners repeatedly trumpet the need for "parity," that principle supports ASARCO's view. No one disputes that the American Rule applies outside bankruptcy and generally precludes fee-shifting because non-bankruptcy professionals do not charge for time spent explaining or defending bills. See US.Br.26, 30 n.11; 78 Fed. Reg. at 36,250, 36,269; *In re Teraforce Tech. Corp.*, 347 B.R. 838, 867 (Bankr. N.D. Tex. 2006). If a non-bankruptcy lawyer and a client have a dispute over a fee and end up in litigation, the lawyer could not with a straight face send the client yet another bill seeking payment for the costs of that litigation.

Petitioners try to assume this point away, noting that "[o]utside of bankruptcy, a client's willingness to pay ends the matter." Pet.Br.18. But the relevant question is what happens when a client refuses to pay. Outside bankruptcy, attorneys must pay their own way in fee disputes unless there is an exception to the American Rule. *St. Rita's*, 260 B.R. at 652; see also *In re Wireless Telecomms. Inc.*, 449 B.R. 228, 236-37 (Bankr. M.D. Pa. 2011); *Brous*, 370 B.R. at 572. That is true for fee disputes with clients *or* with third parties like insurers or increasingly-used outside fee-auditing companies.

Petitioners and the Government believe the only relevant comparison is the fee-shifting context. Pet.Br.28; US.Br.26. But § 330(a) is not comparable to fee-shifting statutes textually, see *supra* Part I.C,

so *Congress* did not think bankruptcy attorneys should be treated the same as lawyers litigating those cases. Nor should the fee-shifting context be the proper baseline among non-bankruptcy areas. Lawyers in fee-shifting cases typically get paid *nothing* if they do not prevail. In that context, it may be particularly important to ensure lawyers get an "undiluted" fee when they do win. But, barring administrative insolvency, bankruptcy lawyers get paid for their services rendered win, lose, or draw, as long as their work benefits the estate and is not duplicative or otherwise unnecessary. Thus, bankruptcy lawyers are more comparable to corporate lawyers and commercial litigators than to civil-rights litigators who will have worked *pro bono* if they do not prevail. Parity applies both ways, *e.g.*, *In re Gulf Consol. Servs., Inc.*, 91 B.R. 414, 418 (Bankr. S.D. Tex. 1988), and supports *disallowing* fees-on-fees.

b. Petitioners' and *amici*'s response to this reality about non-bankruptcy work is to argue that fee objections are uniquely likely in bankruptcy, given that multiple parties can review and object to fee applications. Pet.Br.4, 27-29; US.Br.26.

At the outset, even if objections were more likely in bankruptcy, that would just make Congress's silence all the more telling. Congress surely knew that the system it was structuring would allow broad review of and potential objections to fee applications, so its limited fee authorization and its refusal to provide attorneys' fees for successful fee defense could hardly have been accidental. And if Congress had addressed the issue, it might have decided to have fees paid by the objector rather than the estate, a result that even the Government seems to recognize would reflect a better policy choice. Cf. US.Br.30-31

("more appropriate source for an award of fees" is to sanction objectors where objections were frivolous or otherwise abusive, since it "place[s] the burden of defense fees on the responsible party rather than on innocent creditors"). But of course, Congress did not expressly provide for fees-on-fees at all, which has clear consequences under the American Rule.

Further, the notion that objections are more likely in bankruptcy is a fallacy. While more parties *can* object, none of them has as strong an incentive to review and object as a non-bankruptcy *client* (or loser under a fee-shifting statute) has. Outside bankruptcy, a client (or its insurer or manager) is the one paying the bills, so it has every reason to demand a detailed invoice, review it carefully, and object. Cf. Meg Charendoff, *Survey Of General Counsel Shows There Is Much Ado About Money*, THE LEGAL INTELLIGENCER, Jan. 16, 2008 (survey showing "almost half" of respondents regularly question outside counsel about bills); Laura James, *Under A Microscope: Legal Bill Review Companies Can Put Carriers, Defense Bar In a Tough Spot*, MICHIGAN LAWYERS WEEKLY, Feb. 15, 2013 (more insurers are using "outside legal bill review firms who sometimes work on commission and whose stated mission is to cut payments to attorneys who do insurance defense work"). Clients, insurers, and non-parties have no qualms raising objections to fees outside bankruptcy.

In bankruptcy, by contrast, no single party has the full incentives of a client. Bankruptcy courts and the Trustee have duties to monitor fees, and creditors and others can review fees to ensure the estate is not being inappropriately diminished. But none of them "open[s] its checkbook to pay" the bill in the way a typical client does, which, if anything, makes

getting paid harder outside bankruptcy than in it. *In re The Vogue*, 92 B.R. 717, 725 (Bankr. E.D. Mich. 1988). In fact, bankruptcy practice is characterized by strong incentives for parties *not* to object to fees. The Fifth Circuit and other courts have repeatedly recognized the "conspiracy of silence" that exists in bankruptcy, whereby professionals share the "mutual goal of securing approval for their fees," so they do not contest each other's fee applications. *In re Consol. Bancshares, Inc.*, 785 F.2d 1249, 1255 (5th Cir. 1986); see Pet.App.20a; *In re Busy Beaver Bldg. Ctrs., Inc.*, 19 F.3d 833, 843 (3d Cir. 1994).

In sum, petitioners and *amici* are not merely seeking "parity"; they are seeking a windfall that would allow them to recover litigation costs that are unavailable to most non-bankruptcy practitioners.[20]

2. The dilution concern is unfounded.

Related to "parity" is the policy concern that refusing fees-on-fees may dilute core awards. The Government's prior answer to this is correct and decisive: the concern is "without merit" because the same potential for dilution exists outside bankruptcy. C.A.Rec.345; accord 78 Fed. Reg. at 36,269; *In re DN Assocs.*, 165 B.R. 344, 354 (Bankr. D. Me. 1994). Non-bankruptcy attorneys are subject to the American Rule, which means their awards are "diluted" whenever they have to defend their fees in litigation. If parity is the goal, there is no basis for awarding fees-on-fees under § 330(a), because it would make dilution *uniquely* avoided in bankruptcy.

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[20] Further undermining any complaints about "parity," bankruptcy lawyers are also allowed to bill the estate for time spent *preparing* fee applications. § 330(a)(6). Non-bankruptcy lawyers are rarely, if ever, compensated for preparing bills.

Further, non-bankruptcy rates account for factors like risk of non-payment or the costs of obtaining payment. *E.g.*, *In re Gibbons-Grable Co.*, 151 B.R. 814, 817 (N.D. Ohio 1992). Because bankruptcy professionals use non-bankruptcy rates (which already account for the risk of dilution), allowing fees-on-fees would be a windfall for such professionals. This reality also demonstrates that the Government's (current) position is unworkable in practice. Because lawyers' standard hourly rates typically already account for a risk of dilution or non-payment, courts would have to subtract this risk premium from hourly rates in the process of calculating the amount of fees-on-fees needed to avoid "dilution." That offset would be critical, to ensure bankruptcy lawyers are not overcompensated, but it would be complicated and burdensome to make the necessary calculations.

The dilution concern also misses another key point: sufficient safeguards already exist to avoid dilution and meritless objections. Pet.App.20a-21a. First, parties have a strong disincentive against objecting because they have to bear their costs in fee disputes. Petitioners say objectors can act "with little cost," Pet.Br.5, but ASARCO spent nearly $2 million in fees to pursue what it believed to be legitimate objections. That refutes the unfounded accusation that ASARCO was acting to "[e]xact[] revenge." *Ibid.* The built-in incentives dictate that parties will object, and bear the costs of litigating objections, only when they perceive a reasonable chance of success.

Second, the "rules require professionals to justify their fee applications with detailed, itemized billing records precisely to assure their integrity and sharpen any potential disputes." Pet.App.17a. If profes-

sionals comply, that "should ordinarily reduce the need for or likelihood of success of satellite litigation over fees." *Ibid.*; accord 78 Fed. Reg. at 36,274-75.

Third, bankruptcy courts can award fees as a sanction against parties whose objections are frivolous, Fed. R. Bankr. P. 9011(c)(2), or who act in bad faith or vexatiously, *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 45-46 (1991).[21] Below, the Government deemed this a "sufficient deterrent" against baseless objections and argued "[t]here is no reason to provide a bankruptcy professional with protections not available to non-bankruptcy litigants." C.A.Rec.345-46. Petitioners think these protections lack teeth because parties will walk a line between frivolous and merely meritless objections. Pet.Br.55. That ignores the built-in disincentives discussed above and wrongly pretends parties *could* knowingly walk that line—never mind cynically presuming they would *want* to. The American Rule's longstanding exceptions for bad-faith, vexatious, or frivolous conduct—which, of course, are the *only* exceptions to the Rule available outside bankruptcy—are more than sufficient protection against undue dilution of bankruptcy fees.

3. Petitioners also misunderstand parity.

Petitioners are wrong not only about whose rule achieves parity and what role it plays in § 330(a), but also about what parity has meant and means today.

a. Petitioners suggest the 1978 Act mandated complete equality between bankruptcy and non-bankruptcy practice in every particular. In fact, Congress's main focus was *rate* parity.

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[21] No one suggests ASARCO's objections triggered these exceptions—nor could they. See Pet.App.21.

Prior to the 1978 Act, Congress was concerned specialists "would leave the bankruptcy arena" because courts were setting "arbitrary limit[s]" on rates. H.R. Rep. No. 95-595, at 330 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6286. Thus, in 1978 it authorized courts to award "reasonable compensation for...necessary services rendered...based on...the cost of comparable services" in non-bankruptcy cases. 1978 Act. As Congress confirmed, "the policy of [§ 330(a)] [was] to compensate...professionals serving in a [bankruptcy] case...at the same rate as the...professional would be compensated for performing comparable services" in a non-bankruptcy case. 124 Cong. Rec. 32,394 (1978) (Statement of Rep. Edwards); accord 124 Cong. Rec. 33,994 (Statement of Sen. DeConcini). It was so alarmed by courts slashing rates that it reported its intent to overrule two cases involving such rate-discounting. See 124 Cong. Rec. 32,395; 124 Cong. Rec. 33,994; H.R. Rep. No. 95-595, at 330; see also *In re Drexel Burnham Lambert Grp., Inc.*, 133 B.R. 13, 15-21 (Bankr. S.D.N.Y. 1991) (summarizing history and focus on "rates"). Rate parity was the main focus in 1978; certainly, nothing in § 330(a)'s text indicated Congress had in mind fees-on-fees or other so-called "dilution" that would result from a lawyer's defense of a fee request.

b. More importantly, from the early 1990s until today, Congress and the Trustee have made clear that preventing *overpayment* of bankruptcy professionals is a critical concern.

According to Senator Metzenbaum—author of the 1994 amendments that overhauled § 330(a) to essentially what it is today—"[t]he increased number of bankruptcies...created literally a feeding frenzy for the...professionals who service[d] the unraveling or

the restructuring of a bankrupt debtor." 138 Cong. Rec. S8340-02 (1992). He recognized:

> While the professional fee meters are running full-blast, those responsible for minding the store sit idly by and do nothing.... In many instances, the bankruptcy courts operate more like private clubs for professionals who share the same goal of getting their piece of the action, rather than as the guardian of the bankrupt company and other affected parties. All too often the name of the game is "If you scratch my back, I'll scratch your back."

Ibid. Such concerns motivated Congress in 1994. 140 Cong. Rec. S14597-02 (1994); accord *Lamie*, 540 U.S. at 540 (1994 amendment "designed to curtail abuses in fee awards, according to statements by the amendment's sponsor"). Congress added § 330(a)(4) to *limit* compensation and created a new provision (§ 330(a)(3)) that kept comparability as just one factor. 11 U.S.C. § 330(a) (1994). Petitioners' exclusively pro-fees view thus acts like it is 1978.

Continuing concerns about uncontrolled professional fees have also animated subsequent regulatory efforts. According to the Trustee's Director, "few professionals and, sadly, few courts have shown the inclination to exercise meaningful restraint on professional compensation." White & Theus, *Professional Fees Under The Bankruptcy Code*, 29-JAN Am. Bankr. Inst. J. 22, 80 (2011). Also according to the Director, outside bankruptcy, "private industry has imposed major cost controls on outside counsel," including discounts, "[b]ut in bankruptcy...charging anything other than the full hourly fee often is con-

sidered unfair by the bankruptcy bar." Notes Before The Nat'l Bankr. Conf., at 4, Nov. 10, 2011, available at http://goo.gl/VZJ20X. The result has been transformation of the "comparable services standard...into a bankruptcy premium standard whereby the bankruptcy professionals are allowed to charge rates above what they charge non-bankruptcy clients." *Ibid.* Thus, "the public and the most sophisticated participants in the bankruptcy process say bankruptcy attorneys' costs are rising too rapidly." DOJ, *Justice Department Issues New Guidelines*, June 11, 2013, available at http://goo.gl/kAI8VH.

The Trustee therefore introduced the Guidelines, partly to ensure bankruptcy professionals are subject to non-bankruptcy "market forces." 78 Fed. Reg. at 36,249. It tried to stop "bankruptcy attorneys' costs [that are] rising too rapidly" and to avoid "premium," not "market," rates for bankruptcy attorneys. DOJ, *Justice Department Issues New Guidelines*, *supra*. Indeed, market "comparability" often justifies *restricting* fees. 78 Fed. Reg. at 36,250, 36,265-69.

The high-cost reality of the bankruptcy system was confirmed recently by the American Bankruptcy Institute ("ABI"). See ABI Comm'n to Study the Reform of Ch. 11, Final Report and Recs., Dec. 8, 2014, available at http://goo.gl/Xd76Lo. It noted "[a] common critique of chapter 11 is that it is too expensive," and the "administrative outlay for professionals' fees is often the focal point of debates concerning the costs of chapter 11." *Id.* at 56. It proposed widespread changes to the Code because bankruptcy "is no longer capable of," *inter alia*, "helping to rehabilitate viable companies," in part because the expense of reorganization is so great that companies avoid

bankruptcy altogether. *Id.* at 12, 56. Given all this, the clamoring for *more* professional fees rings hollow.

Petitioners and *amici* assert that bankruptcy courts have discretion to cabin excessive or unreasonable fee requests. But one of the largest studies of fees in bankruptcy cases concluded that objections were mostly ineffective in curbing compensation, in part because 99% of fees and expenses were ultimately approved. LoPucki & Doherty, Professional Fees in Corporate Bankruptcies—Data, Analysis, and Evaluation xxi-xxii, 4-5, 146-47, 157, 215, 259 (2011). Indeed, in this case, the bankruptcy court approved *100%* of petitioners' request for $120 million in core fees. Because petitioners were paid dollar-for-dollar at their standard hourly rates, they have not suffered *any* "dilution" under Congress's view of that concept.

4. Disallowing fees for fee litigation risks no flight of attorneys from bankruptcy.

Petitioners and *amici* threaten the Fifth Circuit's rule would lead to an exodus of lawyers from bankruptcy, but that warning cannot be taken seriously.

First, if fees-on-fees were a critical consideration in choosing a practice area—a dubious proposition—it would be irrational for bankruptcy lawyers to rush to non-bankruptcy work where they *also* cannot obtain fees-on-fees. That is particularly true because bankruptcy practice is a premium practice. In a study of Chapter 11 cases from 1998 to 2007, for example, the total professional fees and expenses for a given case increased about 9.5% per year—nearly four times the rate of inflation. LoPucki, *supra*, at xx. Because "[n]o similar increase has been reported for non-bankruptcy professionals," the seeming re-

sult is "bankruptcy lawyers are paid considerably more than non-bankruptcy lawyers."[22] *Id.* at 147.

Second, no evidence has been offered to support the warnings. Petitioners say a flight "would surely" happen, Pet.Br.50, and their *amici* also offer guesses—that it "may" happen (NACBA Br. 14; NABT Br. 16) or "presents a threat" of happening (NACTT Br. 15). But they present no *evidence* to indicate lawyers have fled the bankruptcy system in districts that have clearly disallowed fees-on-fees.

Third, this case is an especially poor vehicle for petitioners to make their warnings. Any law firm in the country would like to be "undercompensated" the way petitioners were compensated here. Pet.Br.50. Petitioners received over $120 million in core fees for their bankruptcy work, at full rates set and raised by them. It is laughable for them to suggest they would have refused that $120 million engagement if they knew they had to spend time defending it. Indeed, during this same period, petitioners were forced to discount rates *42% of the time* for non-bankruptcy work. Pet.App.91a-92a. The dire warnings about a flight of professionals from bankruptcy work do not withstand scrutiny.

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[22] Petitioners and several *amici* contend the Fifth Circuit's rule would have a more profound impact on smaller consumer cases under Chapters 7 and 13. *E.g.*, Pet.Br.49-50. These arguments again forget that the same American Rule applies to smaller, lower-fee cases outside bankruptcy. They also ignore the growing number of districts with "no look" fees for routine Chapter 7 and 13 cases; "fees at or below a defined threshold may be deemed 'reasonable' without further review" and without filing a fee application. 3 Collier ¶ 330.03[2].

B. The Fifth Circuit's rule gives all parties the proper incentives.

Unsurprisingly, petitioners and *amici* focus only on policy arguments that purportedly cut in favor of higher fees. But the Fifth Circuit's rule promotes the efficiency of the bankruptcy system by giving *all* parties the right incentives going forward.

For one thing, *allowing* fees-on-fees would disincentivize good-faith objections to fee requests. Cf. *Cooter & Gell*, 496 U.S. at 408. For example, if the trustee believes there are plausible but not overwhelming grounds to challenge a fee request, she may simply err on the side of caution if fees will continue to run during the fee dispute. Indeed, objections are currently infrequent, and the specter of incurring fees-on-fees is one explanation. See *McGuirl* v. *White*, 86 F.3d 1232, 1236 (D.C. Cir. 1996). Chilling potentially valid objections to fees undoubtedly harms the bankruptcy system and undermines the attempts to rein in increasing bankruptcy costs.

The Fifth Circuit's rule also protects the interests of creditors and debtors. This full-pay case is "unusual"; in most cases, unsecured creditors and emerging debtors would bear the burden of fees-on-fees. Pet.App.16a-17a; US.Br.30. Petitioners complain about fee dilution, but dilution of recoveries to creditors *caused by* fees-on-fees is more problematic, contravening "the central purpose of a bankruptcy case...to maximize the distribution of assets...to unsecured creditors." *In re Duratech Indus., Inc.*, 241 B.R. 291, 296 (Bankr. E.D.N.Y.), aff'd, 241 B.R. 283 (E.D.N.Y. 1999).

Denying fees-on-fees also provides the right incentives for attorneys. If attorneys know they have

to bear their fees during a fee dispute, they will have strong incentives to ensure that their fees are reasonable and that their fee applications are correct from the start. Pet.App.17a. Petitioners claim fee applicants will face an incentive to accede to all objections, Pet.Br.52, but they will be under no more pressure to do so than non-bankruptcy lawyers whose clients object to bills.

If anything, *allowing* fees-on-fees would create a perverse incentive for fee applicants to drive up the cost of litigation. Here, for example, petitioners sought $8 million for five months of fee litigation, including over $400,000 to "self-audit" their bills (even though their applications and task descriptions should have been correct initially), and $750,000 to produce ASARCO's files. And petitioners apparently believe the meter is *still* running, even in the proceedings before this Court. See Pet.Br.14 n.5. Fee litigation should be a last resort, not a profit center for firms that perform bankruptcy work.

Finally, in a battle over policy interests and getting the incentives right, it bears emphasis that the default rule in our legal system is the American Rule. While a coherent policy argument for a loser-pays system certainly exists, the contrary argument has almost always held sway in this country.

* * *

The vast majority of petitioners' *amici*, like petitioners, are professionals who stand to gain financially from a ruling allowing fees-on-fees. It is unsurprising that lawyers in Beverly Hills (among the *amicus* bankruptcy bar sections) and professionals everywhere want more money and abhor dilution. But Congress had a broader view. Congress rightful-

ly considered all the stakeholders in enacting § 330(a) and providing reasonable compensation for a wide variety of professionals who render necessary services for the estate. Congress clearly did not view litigation over professional fees to be the rare category of litigation that merited fee-shifting. The Fifth Circuit reached precisely the correct result in honoring the balance struck by Congress.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

11 U.S.C. § 327(a) provides:

> Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

11 U.S.C. § 328(a) provides:

> The trustee, or a committee appointed under section 1102 of this title, with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, on a fixed or percentage fee basis, or on a contingent fee basis. Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.

11 U.S.C. § 328(c) provides:

> Except as provided in section 327(c), 327(e), or 1107(b) of this title, the court may deny allowance of compensation for services and reimbursement of expenses of a professional person employed under section 327 or 1103 of this title if, at any time during such professional person's employment under section

327 or 1103 of this title, such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed.

11 U.S.C. § 330(a) provides:

(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103—

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

(2) The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested.

(3) In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

(4)(A) Except as provided in subparagraph (B), the court shall not allow compensation for—

(i) unnecessary duplication of services; or

(ii) services that were not—

(I) reasonably likely to benefit the debtor's estate; or

(II) necessary to the administration of the case.

(B) In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity

of such services to the debtor and the other factors set forth in this section.

(5) The court shall reduce the amount of compensation awarded under this section by the amount of any interim compensation awarded under section 331, and, if the amount of such interim compensation exceeds the amount of compensation awarded under this section, may order the return of the excess to the estate.

(6) Any compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application.

(7) In determining the amount of reasonable compensation to be awarded to a trustee, the court shall treat such compensation as a commission, based on section 326.

RECORD AND BRIEFS

No. 14-103

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IN THE

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Petitioners,

v.

ASARCO LLC,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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TABLE OF CONTENTS

	Page
Introduction	1
Argument	2
A. Baker Botts is not "adverse" to the estate for seeking Code-authorized non-diluted compensation	2
1. Sections 327(a) and 328(c) are inapplicable	3
2. Baker Botts was not "adverse" to the estate when it successfully defended its fee application	4
B. Meritorious defense of a fee application is a "service rendered" that benefits the estate and is necessary to the administration of the case	7
C. ASARCO cannot distinguish §330(a) and "fee-shifting statutes" to justify core-fee dilution only in bankruptcy	12
D. ASARCO's blanket ban on defense fees violates § 330's guarantee of parity with non-bankruptcy compensation	16
E. ASARCO's rule portends harmful results	21

TABLE OF AUTHORITIES

Page

CASES

Alyeska Pipeline Serv. Co. v. *Wilderness Soc'y*,
421 U.S. 240 (1975) 14, 15

Blanchard v. *Bergeron*,
489 U.S. 87 (1989) 15

Comm'r, INS v. *Jean*,
496 U.S. 154 (1990) 10, 12, 15

Gagne v. *Maher*,
594 F.2d 336 (2d Cir. 1979) 12, 16, 22

Gossett & Gossett, P.A. v. *Mervolion*,
941 So.2d 1207 (Fla. Dist. Ct. App. 2006) 19

Hall v. *Cole*,
412 U.S. 1 (1973) 23

Hardt v. *Reliance Standard Life Ins. Co.*,
560 U.S. 242 (2010) 13

In re Borders Grp.,
456 B.R. 195 (Bankr. S.D.N.Y. 2011) 7

In re Consolidated Bancshares, Inc.,
785 F.2d 1249 (5th Cir. 1986) 18

In re Crager,
691 F.3d 671 (5th Cir. 2012) 23

In re Smith,
317 F.3d 918 (9th Cir. 2002) 22

Lamie v. *U.S. Trustee*,
540 U.S. 526 (2004) 3, 24

Lee v. *Daniels & Daniels*,
264 S.W.3d 273 (Tex. App. 2008) 19

TABLE OF AUTHORITIES—Continued

Page

STATUTES

11 U.S.C. § 102(5) 8
11 U.S.C. § 104(a) 14
11 U.S.C. § 110(i) 14
11 U.S.C. § 327 3
11 U.S.C. § 327(a) 1, 2, 3, 4, 5, 6
11 U.S.C. § 328(c) 1, 3, 4
11 U.S.C. § 330 ..... 3, 16, 24
11 U.S.C. § 330(a) ..... *passim*
11 U.S.C. § 330(a)(1) 2, 11, 12, 18, 20
11 U.S.C. § 330(a)(1)(A) 10
11 U.S.C. § 330(a)(2) 10
11 U.S.C. § 330(a)(3) 11
11 U.S.C. § 330(a)(3)(B) 17
11 U.S.C. § 330(a)(3)(C) 8, 12
11 U.S.C. § 330(a)(3)(F) 17, 20
11 U.S.C. § 330(a)(4) 2
11 U.S.C. § 330(a)(4)(A) 8, 11, 12, 18
11 U.S.C. § 330(a)(4)(A)(ii) 7, 8, 9
11 U.S.C. § 330(a)(6) 11
11 U.S.C. § 331 4
11 U.S.C. § 350 ..... 6, 9
11 U.S.C. § 503(b)(2) 9
11 U.S.C. § 507(a)(2) 9
11 U.S.C. § 523(d) 14
11 U.S.C. § 641 14
11 U.S.C. § 642 14

TABLE OF AUTHORITIES—Continued

Page

11 U.S.C. § 643 14
11 U.S.C. § 644 14
11 U.S.C. § 704(a)(1) 6
11 U.S.C. § 704(a)(9) 6
11 U.S.C. § 1106(a)(7) 6
11 U.S.C. § 1129(a)(9) 9
11 U.S.C. § 1302(b) 6
11 U.S.C. § 1326(b)(1) 9
18 U.S.C. § 983(b)(3) 13
28 U.S.C. § 586 6
Tex. Civ. Prac. & Rem. Code § 38.001(8) (West 2014) 19

REGULATIONS AND RULES

78 Fed. Reg. 36,268 (June 17, 2013) 4
Fed. R. Bankr. P. 3022 6

LEGISLATIVE HISTORY

Certain Problems Associated with Evaluating and Monitoring the Fees Charged by Professionals Against Estates in Bankruptcy: Hearing Before the Subcomm. on Courts & Admin. Practice of the S. Comm. on the Judiciary, 102d Cong. (1992) 17, 18

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REPLY FOR PETITIONERS

INTRODUCTION

Faced with nearly all courts and the entire bankruptcy community—former judges, leading professors (including Code drafters), trustees, practitioners, the U.S. Trustee, and even fee examiners (who exist to suppress fees)—advocating for discretion to award fees for successfully defending a fee application, ASARCO grasps at new arguments it never mentioned to the Fifth Circuit and that *no* reported case, including the opinion below, endorses. Bankruptcy counsel, ASARCO now argues, are "adverse" to the estate when they defend their fee applications, violating § 327(a) and § 328(c). Professionals, it claims, do not "assist the trustee" under § 327(a) when they defeat meritless objections. To ASARCO, de-

fending the fee application is not even a "service" under § 330(a)(1). And it argues that § 330(a)(4) prohibits compensation unless a task is both necessary to case administration and directly benefits the estate.

These new arguments all fail on their own terms, for they contravene text, legislative history, and common sense. Perhaps most telling, *every* argument ASARCO makes would equally prohibit compensation for *preparing* a fee application. But universal agreement (even from ASARCO) that preparing fee applications *is* compensable conclusively demonstrates that ASARCO misreads the statute. Both preparing and defending applications can "serv[e]" and "assist" the trustee in accurately determining the administrative expenses the estate owes. Both are equally necessary to case administration and beneficial to the estate, for both are prerequisites for creditors to be ultimately paid and the case closed. ASARCO's arguments cannot sustain the judgment below, and the Court should reverse.

ARGUMENT

A. Baker Botts is not "adverse" to the estate for seeking Code-authorized non-diluted compensation

ASARCO's brief keys on its contention that Baker Botts was "litigat[ing] against the bankruptcy estate" (Br. i (reformulated question presented)) and thus "adverse to the estate" under § 327(a), rendering its fee-defense non-compensable. ASARCO never made that argument until its Supreme Court merits brief for good reason: Baker Botts was not "litigating against the estate."[1] The estate—Baker Botts' client, ASARCO-the-debtor-in-possession—paid all of Baker Botts' core fees

[1] As best petitioners can tell, *no* court has ever used (and no party has ever pressed) this argument as a basis to deny defense fees, including the Fifth Circuit.

without objection. Pet. App. 57a. Baker Botts was instead responding to objections raised solely by Reorganized ASARCO, the new entity (now controlled by the fraudulent-transferor parent company) that emerged from bankruptcy when the plan was confirmed. In defeating these meritless objections, Baker Botts was assisting the estate in determining the proper amount of administrative expenses owed, not "litigat[ing] against the bankruptcy estate." ASARCO thus apparently means something far different when it accuses petitioners of "adversity": it would find adversity whenever the estate will pay professionals' fees for a given task. But that definition of adversity proves far too much and leads to absurd results.

1. *Sections 327(a) and 328(c) are inapplicable*

At the outset, § 327(a) and § 328(c) have no bearing on the compensability questions presented here. Section 327 ("Employment of professional persons") answers only the question of *whom* the trustee "may employ" ("attorneys * * * not * * * adverse to the estate * * * to assist the trustee in carrying out the trustee's duties"). It says nothing about the question here: *For what tasks* can persons so employed be compensated? Congress answered that question in § 330 ("Compensation of officers"), which is why both parties and the courts below have, until now, focused on § 330(a).[2]

Section 327(a)'s adverseness provision is simply a conflict-of-interest safeguard: it ensures the trustee does not hire an attorney who is "adverse to the estate," and it implicitly requires that the court remove an attorney if a conflict arises. See Bloomberg Law: Bankruptcy Trea-

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[2] Section 327(a) prohibits compensation only where professionals were not employed by the trustee. See *Lamie* v. *U.S. Trustee*, 540 U.S. 526, 529, 538-539 (2004). No one disputes that petitioners were employed by the trustee.

tise, pt. I, ch. 26, at III.B (2015). ("The[] [adverse-interest requirement] appl[ies] not just at the time of retention but also throughout the case * * * If an actual conflict of interest exists, disqualification is required * * * "). Section 328(c) complements § 327(a) by providing that courts "may deny" compensation if the professional labored under an undisclosed conflict. Notably, ASARCO never sought to disqualify Baker Botts as adverse under § 327(a) for defending its fee application, nor did ASARCO seek to disallow defense-fee compensation under § 328(c) because Baker Botts had "develop[ed] an 'interest adverse' to the estate," ASARCO Br. 15. Neither provision supports categorically denying defense-fee compensation.

Indeed, labeling as "adverse to the estate" professionals pressed to defend duly-earned fees creates absurd results. Professionals may seek interim compensation every 120 days with "notice and a hearing," and parties may file objections. § 331; 78 Fed. Reg. 36,248, 36,269 (June 17, 2013) (U.S. Trustee has "objected to thousands of interim fee applications"). Yet ASARCO's position would brand professionals "adverse to the estate" the moment they respond to interim-fee objections, requiring their immediate disqualification under § 327(a). That cannot be the law.

2. *Baker Botts was not "adverse" to the estate when it successfully defended its fee application*

To ASARCO, defending the fee application is improperly "adverse to the estate" because fee litigation "has the ultimate goal of *diminishing* the 'estate.'" Br. 27 (emphasis by ASARCO); *id.* at 11. From this premise, ASARCO insists that application-defense "'benefits' *only* the attorneys," *id.* at 27 (emphasis by ASARCO), does

not "assist the trustee[3] in carrying out [his] duties," § 327(a), and is therefore non-compensable.

Even if § 327(a) had any bearing on whether particular tasks performed by an estate professional are compensable, ASARCO's definition of adverseness crumbles under its own weight. It is more draconian than the rejected economy-of-the-estate approach. If defense fees are "*adverse to the estate that the trustee serves*" (ASARCO Br. 17 (emphasis by ASARCO)) simply because creditors would typically pay them, then the inexorable conclusion must be that bankruptcy professionals should work for free. *All* professional fees detract from the estate and (usually, but not here) creditors' recovery, thus becoming "adverse" under ASARCO's test.

Most tellingly, ASARCO's approach would denominate as "adverse" to the estate, and thus non-compensable, the preparation of fee applications. Preparing the application "has the ultimate goal of *diminishing* the estate," ASARCO Br. 27 (emphasis by ASARCO), in precisely the same way as defending the fee application; both are steps in the process of collecting core fees from the estate. Yet ASARCO admits that fee-application preparation *is* compensable. Br. 30. It follows that § 327(a) cannot prohibit compensation for successfully defending the fee application. While both steps benefit the professional by securing compensation, neither benefits *only* the professional.

Specifically, by warding off meritless objections, § 327(a) professionals "assist the trustee" in his statutory duty to oversee § 330(a) compensation and accurately settle the estate, just as they do in initially preparing applications. The trustee must *conclude* § 330(a) compen-

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[3] Like ASARCO (Br. 4 n.2), petitioners' references to "trustees" equally denote Chapter 11 debtors-in-possession.

sation disputes.[4] An estate with unresolved contested matters is not "fully administered" and should not be closed. See § 350; Fed. R. Bankr. P. 3022. Baker Botts' work pursued accurate settlement of the estate's business. Defending its fee application was necessary to establish that ASARCO's core-fee objections were wholly meritless (as the courts below held) and should thus be disregarded in wrapping up the case.

The very "trustees" that the statute references—Chapter 7 and 13 trustees who routinely employ professionals to assist them in administering bankruptcies—agree with petitioners. The national trustee organizations argue that attorneys *may* be compensated for successfully defending their fee applications. NABT Br. 2, 7-8; NACTT Br. 3-7. These *amici* are not "Beverly Hills [lawyers]" who "want more money," ASARCO Br. 57; they are officers of the court appointed by the U.S. Trustees to administer bankruptcies. See 28 U.S.C. § 586. If fee litigation were categorically adverse to trustees, or even no "assist[ance]" to them, no one would be more likely to spring to ASARCO's defense. Yet every trustee appearing as *amicus* supports Baker Botts.[5]

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[4] See, *e.g.*, § 704(a)(1), (9) (describing trustee's duty to "close [the] estate" and "file a final account of the administration of the estate"); § 1106(a)(7) (describing trustee's duties "after confirmation of a plan"); § 1302(b); Ch. 11 Trustee Handbook, Dep't of Justice (2004), at 68, 70, 76 (trustee must "actively supervise * * * reasonableness and necessity of [professional] fees and expenses" and "review" and "object" to "professional fee applications"); cf. NABT Br. 2, 5-6, 17-18; NACTT Br. 2.

[5] ASARCO argues (Br. 17-18) that an accountant retained by the estate could not be compensated for attorneys' fees it incurs defending its fee application because the attorney would not have been retained by the trustee under § 327(a). While that question is not presented here since Baker Botts was undisputedly employed under § 327(a), ASARCO's citation-free assertion is baseless. As with attorneys who must defend their own core-fee application, the statuto-

B. Meritorious defense of a fee application is a "service rendered" that benefits the estate and is necessary to the administration of the case

Flowing from ASARCO's contention that defense of a fee application is "adverse" to the estate is its argument that fee-defense cannot be a "service" or "benefit" to the estate or even "necessary to the administration of the case." See § 330(a)(4)(A)(ii). This assertion fails for much the same reasons as ASARCO's adversity gambit.

1. ASARCO contends that successfully defending fee applications cannot be a "service rendered" because it is not performed "for others." Br. 16; accord U.S. Br. 31-34. By isolating "service rendered" from the rest of the statute, ASARCO misunderstands the nature of bankruptcy professionals' essential work to determine the estate's administrative expenses and close the case. Such work—which includes both preparing the fee application and defeating objections—provides a service to the estate in accurately determining the amount that remains to be distributed to creditors, enabling the court to close the case. Successfully defending the application is thus performed "for others" just as much as initially preparing it, which all agree is compensable.[6]

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ry grant of "reasonable compensation" and "necessary expenses" to professionals necessarily includes discretion to award legal costs incurred defending the core-fee application. Courts have frequently so held. *In re Borders Grp.*, 456 B.R. 195, 203-209 (Bankr. S.D.N.Y. 2011) (surveying case law).

[6] ASARCO analogizes the fee application to a mechanic's preparation of a bill for his work, characterizing both as a final "service rendered," distinguishable from subsequent "adversarial" disputes over the bill. Br. 31. But the analogy quickly breaks down: a mechanic could hardly expect a customer to cheerfully pay for this invoicing "service," whereas preparing a detailed fee application for court review is compensable. That is because case-administration "services" in bankruptcy are simply different animals from typical bilateral

The text confirms that a "service rendered" need not directly enhance the estate to be compensable. Indeed, courts must consider whether "*the services* were necessary to the administration of, or beneficial at the time at which the *service was rendered* toward the completion of, *a case*." § 330(a)(3)(C) (emphasis added); accord § 330(a)(4)(A) (prohibiting compensation unless "service" was "necessary to the administration of the case" or likely to benefit estate). Congress recognized that case-administration and case-completion services are compensable even if not performed directly on the estate's behalf.

2. ASARCO next misreads § 330(a)(4)(A)(ii) by contending that a service must satisfy *both* prongs to be compensable. The plain text refutes that, as even the Fifth Circuit recognized. Pet. App. 15a; see also Texas Br. 5-16 (linguistic analysis); U.S. Br. 6 (endorsing petitioners' disjunctive reading). ASARCO's understanding would make "and" and "or" wholly interchangeable, with *no* difference in textual meaning. After the statutory double negative ("the court shall *not* allow compensation for * * * services that were *not*"), the use of "or" permits an election, whereas the use of "and" would require satisfaction of both. ASARCO's reading violates the Code's rules of construction, which provide that "'or' is not exclusive," § 102(5); thus, "if a party 'may do (a) or (b),' then the party may do either or both." 11 U.S.C. § 102 hist. n. Legislative history eliminates any remaining doubt, as Congress added the case-administration prong in 1994 to *loosen*, not restrict, compensation by replacing the initial Senate version that required a benefit to the estate. Pet.

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commercial relationships: such services—including both application-preparation and fee-defense—are not performed directly for a client, but are instead performed to accurately determine administrative expenses and enable closing of the case.

Br. 37-38. ASARCO ignores this powerful legislative history throughout its brief.

3. Even if fee-application defense *were* required to satisfy both § 330(a)(4)(A)(ii) conditions, ASARCO would still lose. As the district court found, "Baker Botts' actions resolving outstanding fee issues clearly benefits the estate," for "the bankruptcy case cannot be put to bed until these matters are resolved." Pet. App. 47a. ASARCO ignores, rather than answers, the mountain of authority supporting Baker Botts' showing that successfully defending the fee application is necessary to accurately determine the estate's administrative expenses, which is in turn necessary for final payment to creditors. Pet. Br. 25-26 (collecting cases and citing §§ 503(b)(2), 507(a)(2)); see also § 350 (case must be "fully administered" before closing); § 1129(a)(9) (plan must provide for full payment of administrative expenses to be confirmed); § 1326(b)(1) (administrative expenses must be paid before creditors). Resolving fee disputes is thus literally "necessary" to closing the case *and* to enabling the estate to finally pay its administrative expenses and its creditors—which certainly qualifies as a "benefit."

4.a. ASARCO's argument again founders on its inability to materially distinguish fee-application preparation from fee-application defense. If (as ASARCO claims) a compensable activity must satisfy both § 330(a)(4)(A)(ii) prongs, then ASARCO's admission that preparation is compensable proves that preparation is *both* beneficial *and* necessary. Because defense and preparation are successive steps along the same case-closing path, both must be beneficial and necessary. ASARCO's contention that defending fee applications is not compensable because it does not "benefit" the estate to learn how much it owes professionals, Br. 27-28, is therefore internally incoherent. That determination is also the *raison d'être* of preparing fee applications, which ASARCO concedes

does benefit the estate.

b. ASARCO's next attempt fares no better:

> Fee-application preparation is 'necessary' for the straightforward reason that *the bankruptcy rules require it* * * * for professionals to be compensated. But petitioners cannot plausibly contend that fee *litigation* is needed to close the case * * *

Br. 28 (all emphases by ASARCO; citations omitted). To the contrary, the statute mandates "notice to the parties in interest and a hearing" to determine compensation and allows the "court on its own motion" or acting "on the motion of the United States Trustee * * * or any other party in interest" to award less than the requested compensation. § 330(a)(1)(A), (a)(2). The statute thus equally "require[s]" a fee application *and* fee litigation before professionals can be compensated and the case closed. Moreover, as the statutes cited, *supra* at 9, indicate, fees must be *determined*—not merely applied for—before creditors are ultimately paid. Thus, Baker Botts did not merely "feel" it was necessary "to pursue fees," ASARCO Br. 28; it was "forced to respond" to ASARCO's objections if it wished to recover core fees and if the estate was to have an accurate resolution of its debts. Pet. App. 142a.

ASARCO's objections were certainly of no benefit to the estate, but once ASARCO chose to lodge them, the Code and rules required that they be answered. ASARCO cannot throw a wrench in the works and then complain that Baker Botts had to expend resources to fix it. Petitioners could no more default on the "hearing" required by § 330(a) or responding to the "motions" it contemplates than they could default on the application itself. See *Comm'r, INS* v. *Jean*, 496 U.S. 154, 161-162 (1990) (requiring courts determining fees to "treat[] a case as an inclusive whole, rather than as atomized line-

items," and finding "no textual or logical argument for treating so differently a party's preparation of a fee application and its ensuing efforts to support that same application").

c. Finally, ASARCO attempts to defend its illogical position by noting that § 330(a)(6) expressly mentions fee-application preparation but not fee-application defense. Br. 30 & n.13. But ASARCO correctly acknowledges that authority for compensating fee applications or any other service must come from § 330(a)(1). Br. 12, 34-35. Section 330(a)(6) merely provides a metric for compensation, and even ASARCO cannot claim that § 330(a)(6) *is itself* authority for such compensation. Given that admission, Congress's acknowledgement of fee-application compensation—for the purpose of *limiting* it—cannot possibly establish that it is categorically different from fee-defense work when it comes to compensability *vel non*.

5. While ASARCO assigns "dispositive" weight to § 330(a)(6)'s non-authorizing language (Br. 30), it chides Baker Botts for invoking the mandatory § 330(a)(3) "factors" courts "shall" consider in determining "the amount of reasonable compensation to be awarded." Contrary to ASARCO's pretensions (Br. 34-35), Baker Botts never argued that the § 330(a)(3) factors independently authorize compensation for particular services. Nor are the § 330(a)(3) factors alone in reflecting Congress's mandate to compensate tasks that are necessary to "case" (not just "estate") administration; § 330(a)(4)(A) directly accomplishes that goal by permitting compensation for § 330(a)(1) services that are *either* beneficial to the estate *or* necessary to case administration. Pet. Br. 37-38.

The § 330(a)(3) factors are important because they illuminate the values Congress requires judges to pursue while exercising their broad discretion to ensure reasonable compensation. This guidance about how to deter-

mine the "amount" of compensation necessarily illuminates which work is compensable, subject only to § 330(a)(4)(A)'s prohibitions. Rather than confronting § 330(a)(3)(C)'s salient emphasis on compensating tasks "beneficial * * * toward the completion of [the] case," ASARCO avoids it by re-urging its misinterpretation of § 330(a)(4)(A)'s prohibition. Br. 36.

C. ASARCO cannot distinguish § 330(a) and "fee-shifting statutes" to justify core-fee dilution only in bankruptcy

1. Baker Botts agrees with the Government that defense fees would be allowed to ensure reasonable compensation for core work *even if* fee-application defenses were not independently compensable "services" under § 330(a)(1). U.S. Br. 25. "Denying attorneys' fees for time spent in obtaining them would dilute the value of a fees award by forcing attorneys into extensive, uncompensated litigation in order to gain any fees." *Jean*, 496 U.S. at 162 (quoting *Gagne* v. *Maher*, 594 F.2d 336, 344 (2d Cir. 1979)). Courts do not rely on any specific textual authorization to award *defense fees* under the various fee statutes. See ASARCO Br. 41 n.17 (conceding that no statutory fee provision "authorize[s] fees-on-fees *by name*") (emphasis by ASARCO). But that of course does not mean that the unanimous *Jean* Court (and myriad others) have created an impermissible "judicial exception" to the American Rule for defense fees.[7] Rather, courts award defense fees to ensure that attorneys are paid "reasonable compensation" for the *core work* everyone agrees is compensable. See Pet. Br. 40-46.

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[7] In repeatedly accusing the Government of seeking a "judicial exception" from the American Rule, ASARCO takes the quoted phrase from the U.S. Trustee Guidelines out of context. Br. 22, 24. The Trustee simply recognized that courts had allowed defense-fee awards, not that such awards were unmoored from statutory text.

Here, no one disputes that petitioners' work representing the estate for five years constituted "services rendered" that merited full compensation. The question is whether ASARCO may unilaterally dilute those core fees through meritless objections. ASARCO fails to show why the anti-dilution rationale for defense fees that consistently applies under other statutes is uniquely inapplicable in bankruptcy, where dilution is *especially disfavored*, see *infra* Part D.

2. ASARCO spills much ink to identify textual differences between § 330(a) and some "fee-shifting" statutes (which vary widely themselves). For example, ASARCO notes that § 330(a) does not use magic words like "prevailing party" or "reasonable attorney's fees." Br. 39-42. But ASARCO points to no case or logical principle showing why these textual phrases are essential to creating a fee-recovery regime or displacing the American Rule, much less why they uniquely trigger the availability of defense fees to avoid core-fee dilution.

To the contrary, fees are limited by the *presence*, not the *absence*, of a "prevailing party" requirement; some fee-shifting statutes omit it. See, *e.g.*, *Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U.S. 242, 254 (2010) (by using standards "less stringent [than] the traditional prevailing party standard, Congress * * * *expand[s]* the class of parties eligible for fee awards") (emphasis added; internal citations and quotations omitted). Nor is there any requirement that fee statutes use the term "attorney's fees," and indeed some do not. See, *e.g.*, 18 U.S.C. § 983(b)(3). That illustrates another weakness in ASARCO's case, for § 330(a) allows courts to award "compensation" to "professionals" rather than "reasonable attorney's fees" to a "prevailing *party*." This broader scope makes bankruptcy professionals' compensation *more* dependable under § 330(a)—consistent with congressional objectives—than under the alternatives that

ASARCO identifies.[8]

3. ASARCO ignores this Court's *direct statement* in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 260 n.33 (1975), that even the old Bankruptcy Act displaced the American Rule. The cited sections of the Act did not contain the "prevailing party" language that ASARCO deems essential to displace the American Rule. See 11 U.S.C. §§ 104(a), 641-644 (1970). For example, much like § 330(a) today, § 641 provided for "reasonable compensation for services rendered." ASARCO thus finds itself directly at odds with this Court. Its only mention of *Alyeska*'s statement (Br. 21 n.7) seeks to blunt its impact by invoking *Alyeska*'s observation of considerable variation among statutes that displace the American Rule. See 421 U.S. at 260. Agreed—§ 330(a) does not operate precisely like other statutes. But that does not help ASARCO. *Alyeska*'s point was that, despite internal differences, widely varying statutes *share* the feature that matters here: By creating an alternative fee structure, *they displace the American Rule.*

4. ASARCO finally argues (Br. 42) that bankruptcy is distinguishable from fee-shifting schemes because bankruptcy is not "adversarial" like other litigation aimed at "vindicat[ing] * * * constitutional or statutory rights." But no case or principle identifies adversariness as the *sine qua non* for displacing the American Rule or vindicating federal rights. Indeed, this Court included the Bankruptcy Act in its list of statutes that allow attorney fees in the name of "granting or protecting various

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[8] Noting two bankruptcy statutes that shift fees to prevailing parties, ASARCO infers that Congress did not intend defense-fee recovery in § 330(a). Br. 41 (citing 11 U.S.C. §§ 110(i), 523(d)). But neither statute shifts fees to estate-retained attorneys, prohibiting any inference about whether § 330(a)'s broad grant of "reasonable compensation" may include defense fees.

federal rights." *Alyeska*, 421 U.S. at 260 & n.33. A bankruptcy professional's work is sometimes adversarial (fraudulent-transfer litigation, fee disputes) and sometimes not, but Congress fully compensated all "services rendered." There is no reason to think Congress would desire dilution of a bankruptcy professional's core compensation simply because some of the underlying work was not adversarial.

5. For all of these reasons, ASARCO's assertion that § 330(a) is not a "fee-shifting" statute—in the sense that fees are not shifted to the losing party in an adversary proceeding—is irrelevant to whether § 330(a) displaces the American Rule and permits defense-fee awards to avert core-fee dilution.[9] Baker Botts has consistently acknowledged that § 330(a) is not a "prevailing party" or traditional "fee shifting" statute. See ASARCO Br. 43-44 (citing petitioners' arguments to this effect below). The key point is that § 330(a) is *analogous* to fee-shifting statutes in the respects relevant to determining the question here. Both regimes require courts to independently assess the reasonableness of fees, both allow non-clients to object to fees, and, consequently, both guard against diluting fees for core work in order to attract competent counsel and protect federal rights.[10]

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[9] Even if this were the test, ASARCO's fee attack here was certainly adversarial and resulted in a fee-shifting award, because the losing objector rather than the fully-paid creditors must cover Baker Botts' defense fees.

[10] ASARCO argues that in fee-shifting statutes "concerns about dilution are apt because an attorney for a non-prevailing plaintiff may receive no compensation at all." Br. 42. But fee-shifting statutes award fees regardless whether the attorneys would otherwise be paid by their clients, *Blanchard* v. *Bergeron*, 489 U.S. 87, 94 (1989), and in contexts where litigants are not necessarily penurious, such as the Patent Act. Thus, this Court has framed the dilution concern in terms of avoiding dilution for *compensable core work*. *Jean*, 496 U.S.

ASARCO rightly perceived this "big picture" in its briefing below: "Section 330 and the federal fee-shifting statutes share a common goal of determining 'reasonable' compensation to attorneys. Both have the policy objective of attracting competent counsel by ensuring compensation commensurate with what is available in other cases." Sealed C.A. Rec. 30. ASARCO now tries to limit these statements to whether fee enhancements are available under § 330(a). Br. 44 n.19. But it was more candid below: "Bankruptcy courts routinely look to non-bankruptcy federal fee-shifting cases for guidance in assessing the *reasonableness* of fee applications, *regardless of whether a fee enhancement is sought.*" Sealed C.A. Rec. 27 (emphasis added). ASARCO's statement is unassailably correct in the context of the question presented now. Numerous courts have awarded defense fees to safeguard "reasonable compensation" under § 330(a) by relying on the anti-dilution rationale first stated in fee-shifting cases. See Pet. App. G (collecting cases). That concern is even more acute in bankruptcy due to the unique procedural burdens of seeking and defending bankruptcy fees that are not present in fee-shifting cases, including a more detailed application and review by more potential objectors, including the U.S. Trustee.

D. ASARCO's blanket ban on defense fees violates § 330's guarantee of parity with non-bankruptcy compensation

In ASARCO's revisionist telling, Congress was insensitive to the risk of fee dilution that inheres in bankruptcy's detailed fee-application and litigation process. Indeed, ASARCO asserts that dilution from defense-fee denial is no different from what happens outside bankruptcy. Its arguments lack merit.

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at 162 (quoting *Gagne*, 594 F.2d at 344). That same concern exists in bankruptcy.

1. ASARCO asserts that "Congress's main focus was *rate* parity." Br. 50 (emphasis by ASARCO). ASARCO takes the illogical position that Congress *stopped* at the "sticker price" for rates. The text defeats that view. The parity factor examines not *rates*, but "customary *compensation* charged by comparably skilled practitioners." § 330(a)(3)(F) (emphasis added). Congress was concerned with the practitioner's *entire* "compensation," not merely initial "rates." Another factor in the same subsection—§ 330(a)(3)(B)—*does* use the word "rates," showing that Congress chose not to adopt ASARCO's parsimonious parity standard.

ASARCO offers no reason to believe Congress would be concerned enough about parity to insist on comparable rates—yet so indifferent to parity as to lack interest in whether bankruptcy practice's unique features would inevitably dilute what started out as nominally equal compensation. Indeed, Congress's decision to compensate application-preparation refutes this view.

2. ASARCO badly misreads the record in invoking Senator Metzenbaum's comments as a basis for rejecting bankruptcy-court discretion here. Br. 51-52. Senator Metzenbaum opposed paying bankruptcy lawyers for anything related to securing fees. Allowing "[p]rofessionals [to] charge hefty fees just for preparing their bills," he declared, was "an absurdity." "Think about it. In any other area, do people charge for preparing their bills?"[11]

This revealed Senator Metzenbaum's misunderstanding of the nature of bankruptcy fee applications. His analogy of paying for preparation of a "plumber's" bill, and his statement that "when [he] practiced law, the av-

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[11] Certain Problems Associated with Evaluating and Monitoring the Fees Charged by Professionals Against Estates in Bankruptcy: Hearing Before the Subcomm. on Courts & Admin. Practice of the S. Comm. on the Judiciary, 102d Cong. 3 (1992) ("Professional Fees").

erage bill in [his] office was prepared by one of the secretaries,"[12] demonstrated as much. But he was soon disabused, as witnesses, and eventually Senate colleagues, explained that bankruptcy practice is far more burdensome. Congress rejected Senator Metzenbaum's views by compensating fee-application preparation as a necessary case-administration service under § 330(a)(1) and (a)(4)(A), the same provisions that permit fee awards for defending applications. And Congress repeatedly amended Senator Metzenbaum's initial draft, modifying provisions requiring services to "benefit the debtor's estate" to allow compensation for case-administration services. Pet. Br. 36-38. ASARCO and the Fifth Circuit have now dredged up the Metzenbaum approach in an effort to achieve by judicial fiat what Congress refused to enact.[13]

3.a. ASARCO's argument largely depends on its view that securing fees in bankruptcy is no different from securing fees from non-bankruptcy clients, where the American Rule applies. Br. 45-50. Petitioners will not re-till this ground: bankruptcy fees are *inherently* more burdensome to recover. Pet. Br. 25, 27-30; NABT Br. 5-6. ASARCO compares the frequency of objections in bankruptcy—which often require full-dress litigation—to requests by non-bankruptcy clients for explanations or discounts. Br. 47. But it carefully avoids discussing how many non-bankruptcy client matters end up *in court* (a tiny fraction) versus how many bankruptcy fee applica-

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[12] Professional Fees, *supra*, at 111, 253-254.

[13] Indeed, Senator Metzenbaum quoted the "conspiracy of silence" alleged in *In re Consolidated Bancshares, Inc.*, 785 F.2d 1249, 1255 (5th Cir. 1986), as justification for denying fee-related compensation. Professional Fees, *supra*, at 3. Remarkably, the Fifth Circuit below quoted this same language, resurrecting Senator Metzenbaum's discarded rationale. Pet. App. 20a.

tions do (100%).

ASARCO tries to dodge the stunning lack of parity *in this case* by declaring that the "relevant question is what happens when a client refuses to pay." Br. 45. Not so: here, Baker Botts' *client*—ASARCO-the-debtor-in-possession—fully and willingly paid its bills. Pet. App. 57a. Outside bankruptcy, neither fee litigation nor court approval would have been necessary. With the client having fully paid, no third party (neither "insurer" nor "fee-auditing compan[y]," ASARCO Br. 45) could force Baker Botts into a time-consuming and dilutive dispute. But inside bankruptcy, Reorganized ASARCO—a non-client controlled by the fraudulent transferor—had a statutory right to object to Baker Botts' fees and force punishing litigation. Parity and non-dilution demand at least that bankruptcy courts retain *discretion* to compensate successful defenses where the client has paid the professional's core fees.

b. But even when the relevant comparison is a client who litigates over fees, ASARCO is still wrong about parity. It repeats the unsupported assertion that "[a] non-bankruptcy lawyer * * * who ends up in litigation with a client over fees does not then get to send the client a bill for the cost of that litigation." ASARCO Br. 13. To the contrary, if this litigation had involved a non-bankruptcy client who breached a contract of engagement (for instance, through non-payment of some or all of the fees due), Baker Botts could pursue a breach-of-contract action, *which entitles it automatically to attorney's fees.* See Tex. Civ. Prac. & Rem. Code §38.001(8); *Lee* v. *Daniels & Daniels*, 264 S.W.3d 273, 282 (Tex. App. 2008) (attorney "entitled to recover his attorney's fees" in suit to recover disputed fees from client). Nor is there any impediment outside bankruptcy to an engagement letter specifically providing for such fees. See, *e.g.*, *Gossett & Gossett, P.A.* v. *Mervolion*, 941 So.2d 1207, 1209 (Fla. Dist.

Ct. App. 2006) (enforcing retainer agreement obligating clients to pay attorney's fees incurred by law firm in "any legal action to collect fees incurred by the client"). But in bankruptcy, neither option is available; the professional must submit to the rigors of § 330(a) and the bankruptcy rules.

c. Seemingly accusing courts and the U.S. Trustee of lax enforcement, ASARCO opines (Br. 49, 52-54) that bankruptcy lawyers in Chapter 11 cases charge "premium" rates, and face less pushback from potential objectors than non-bankruptcy lawyers face from their clients. But see Pet. Br. 53-55; NACBA Br. 5-7, 16-17 (conspiracy of silence cannot exist in most consumer cases). Such assertions are best addressed through case-by-case vigilance with respect to core fees, not through a blanket ban on defense fees even in cases where ASARCO's assertions are demonstrably untrue. Here, all three lower courts found that Baker Botts' fee was 20% "below-market." Pet. App. 4a, 10a-11a. And Baker Botts' fees were vigorously tested by ASARCO's wide-ranging objections—far beyond those raised by non-bankruptcy clients.

If bankruptcy lawyers in fact seek premium rates through a "conspiracy of silence" in a given case, courts should correct that problem by independently enforcing § 330(a)(1)'s rule of "reasonable compensation" and § 330(a)(3)(F)'s comparability factor as applied to those core fees. To the extent Congress was concerned with some lawyers charging excessive core fees, nothing in the legislative history suggests that the answer is categorically denying defense fees to arbitrarily dilute premium, market, and below-market core fees alike, including the fees of lawyers who earn a few thousand dollars per case. Cf. NACBA Br. 12; NABT Br. 4.[14]

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[14] ASARCO even argues (Br. 48 n.20) that bankruptcy lawyers col-

E. ASARCO's rule portends harmful results

1. ASARCO ignores the perverse incentives its rule creates, while proclaiming that it "protects the interests of creditors and debtors." Br. 56. Yet not a single organization representing creditors or debtors joined ASARCO's cause. But organizations representing both creditors and debtors, as well as trustees and former judges, refute ASARCO's assessment. Nearly all courts agree that ASARCO's rule would generate meritless objections and wasteful satellite litigation, or force professionals to preemptively surrender their core fees commensurate with the fee-litigation costs threatened by blackmailing objectors. Pet. Br. 51-52. The prospect of exceedingly rare bad-faith sanctions will not deter even wholly worthless objections, as this case illustrates.

2. To bolster its argument that defense-fee compensation would incentivize professionals to excessively litigate fee applications, ASARCO presents its own version of the facts below. Br. 7-9, 57. But its creative rendering contravenes the bankruptcy and district courts' factual findings, which affirmed the reasonableness of Baker Botts' fee-defense costs and which ASARCO declined to appeal further. Pet. Br. 12-14. For example, ASARCO asserts (Br. 57) that Baker Botts charged over $400,000 for self-auditing its bills "even though their applications and task descriptions should have been correct initially." But the bankruptcy court specifically found that Baker Botts' initial application was correct and that "none" of the defense-fee award corresponded to "the recreation of initially inaccurate or insufficient time records." Pet.

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lect "premium" fees because they may be compensated for preparing fee applications. But this ignores that application compensation is necessary to reach parity precisely because fee applications are far more burdensome than client bills outside bankruptcy.

App. 149a-150a.[15] Courts' consistent exercise of discretion to deny fees to professionals who seek to make fee-defense work a "profit center" (ASARCO Br. 57), amply deters such behavior. *E.g.*, *In re Smith*, 317 F.3d 918, 928-929 (9th Cir. 2002) (courts properly deny defense fees where defense is "merit[less]" or "merely to get litigation fees").

3. Discretion also solves the charge that petitioners' interpretation of § 330(a) would allow compensation for *unsuccessful* defenses. See *Gagne*, 594 F.2d at 344 ("The exercise of discretion, however, gives the district judge great leeway. If the fee claims are exorbitant or the time devoted to presenting them is unnecessarily high, the judge may refuse further compensation or grant it sparingly."). ASARCO identifies no outbreak of improper awards—or even *one* such award. Courts have sensibly held that unsuccessful defenses are non-compensable. *E.g.*, *Smith*, 317 F.3d at 928-929. As a matter of discretion *and* statutory interpretation, it is hard to see how pursuing fees *for which one should not have applied in the first place* is "necessary" to case administration. See *ibid.*[16]

Discretion likewise answers ASARCO's oft-stated concern about "diminishing" an estate by awarding defense fees that substantially reduce recovery for unsecured creditors. As this Court observed in a comparable context involving the depletion of union funds needed for collective action, this consideration may be "an important

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[15] Most of the 191 timekeepers about which ASARCO complains expended a few hours to respond to ASARCO's "meritless [time-entry] objection" and demand for "every document" created during the bankruptcy. Pet. App. 150a, 3a; see C.A. Rec. 6847-6851.

[16] Similarly, the district court found that pursuing a fee enhancement was not "necessary" as a matter of law and therefore not compensable. Pet. App. 49a.

one," but "it is relevant, not to the *power* of federal courts to award counsel fees generally, but, rather, to the exercise of the District Court's discretion on a case-by-case basis." *Hall* v. *Cole*, 412 U.S. 1, 9 n.13 (1973) (emphasis added). Distrustful of Congress's reliance on discretion, ASARCO would categorically bar fees for *successful* defenses and when creditors are *not* adversely affected.[17]

4. Preferring to focus on large Chapter 11 bankruptcies with purported "premium" rates, ASARCO *does not dispute* the devastating effect its rule will have on millions of small and consumer bankruptcies with modest rates. *Amici* Chapter 7 and 13 trustees compellingly explain that professionals would commonly suffer crippling—even 100%—dilution under ASARCO's rule, deterring practitioners from taking these important cases. NACTT Br. 4-5; NABT Br. 6, 16-19; NACBA Br. 14-15. Even though these trustees frequently object to professional fees, and thus are "advantage[d] [by] the Fifth Circuit's holding" in a narrow sense, they "urg[e] reversal because of the broad impact the holding has on the overall system." NACTT Br. 5, 10.[18]

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[17] Discretion has been this case's central concept from literally the first page of Baker Botts' petition to the last page of its merits brief. Tellingly, ASARCO barely mentions it—the word "discretion" appears only four times (three in footnotes) in its nearly 15,000-word response brief. See Br. 9 n.5 (twice), 37 n.15, 54.

[18] ASARCO responds only in a footnote observing that some districts allow no-look fees that eliminate the need to file a fee *application* for the simplest Chapter 13 matters. Br. 55 n.22. But even in that narrow realm, no-look fees do not eliminate the dilution threat because parties-in-interest maintain their statutory right to mount *objections* to the no-look fee at the close of a case. See *In re Crager*, 691 F.3d 671, 676-677 (5th Cir. 2012) (holding that professional bears burden to justify no-look fee against objections because no-look arrangements do "not supplant the requirements of [§ 330(a)]"); NACBA Br. 12-14 (discussing dilution in context of no-look fees).

ASARCO irresponsibly dismisses the warnings of these independent and well-informed voices as mere "guesses." Br. 55. But it cannot dispute that "seeming order has attended" (*Lamie*, 540 U.S. at 537) the use of discretion to award defense fees for decades in the Ninth Circuit and the overwhelming majority of jurisdictions throughout the country. ASARCO gives no good reason to trade this well-functioning system for the perilous future predicted by the full spectrum of *amici*.

Respectfully submitted.

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BAKER BOTTS, L.L.P., ET AL., PETITIONERS

v.

ASARCO, L.L.C.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTION PRESENTED

Section 327 of the Bankruptcy Code provides that bankruptcy trustees and Chapter 11 debtors in possession may, with a bankruptcy court's approval, employ attorneys or other professionals "to represent or assist [them] in carrying out [their] duties" under the Code. 11 U.S.C. 327(a); see 11 U.S.C. 1107(a). Under 11 U.S.C. 330(a), the court may award an attorney or other professional employed under Section 327 "reasonable compensation for actual, necessary services rendered." 11 U.S.C. 330(a)(1)(A). Compensation awarded under Section 330(a) is treated as an administrative expense and is paid out of the assets of the bankruptcy estate before the claims of most unsecured creditors. 11 U.S.C. 503(b), 507(a). The question presented is as follows:

Whether Section 330(a) authorizes a bankruptcy court to award additional compensation to an attorney for work performed in litigating the attorney's application for compensation under that provision.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 11
Argument 14
I. Section 330(a) authorizes an award of fees for the defense of a fee application to the extent necessary to provide reasonable compensation for core services 16
A. The categorical denial of defense fees would contravene Section 330(a) by diluting compensation for core services 16
B. The arguments advanced in favor of a complete ban on compensation for fee-defense work lack merit 24
C. In many cases, compensation for fee-defense work will not be necessary to preserve the reasonableness of a professional's compensation for core services 26
II. Work performed defending a fee application does not constitute independently compensable "services rendered" under Section 330(a) 31
Conclusion 34

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Blum v. *Stenson*, 465 U.S. 886 (1984) 21, 23
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Camacho v. *Bridgeport Fin., Inc.*, 523 F.3d 973 (9th Cir. 2008) 19, 20
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Commissioner, INS v. *Jean*, 496 U.S. 154 (1990) 19, 20, 23, 28, 29
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Eliapo, In re, 468 F.3d 592 (9th Cir. 2006) 16
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Gagne v. *Maher*, 594 F.2d 336 (2d Cir. 1979), aff'd, 448 U.S. 122 (1980) 20, 29
Hensley v. *Eckerhart*, 461 U.S. 424 (1983) 17
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Manoa Fin. Co., In re, 853 F.2d 687 (9th Cir. 1988) 22, 27
Market Ctr. E. Retail Prop., Inc., In re, 730 F.3d 1239 (10th Cir. 2013) 16
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Missouri v. *Jenkins*, 491 U.S. 274 (1989) 21
Nucorp Energy, Inc., In re, 764 F.2d 655 (9th Cir. 1985) 18, 22, 26
Olson, In re, 884 F.2d 1415 (D.C. Cir. 1989) 25
Pennsylvania v. *Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986) 19
Perdue v. *Kenny A.*, 559 U.S. 542 (2010) 21, 22, 23
Quigley Co., In re, 500 B.R. 347 (Bankr. S.D.N.Y. 2013) 28, 29
Setser v. *United States*, 132 S. Ct. 1463 (2012) 24
Smith, In re, 317 F.3d 918 (9th Cir. 2002), cert. denied, 538 U.S. 1032 (2003) 18, 19, 27, 33
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Taxman Clothing Co., In re, 49 F.3d 310 (7th Cir. 1995) 22
Thompson v. *Gomez*, 45 F.3d 1365 (9th Cir. 1995) 29
Top Grade Sausage, Inc., In re, 227 F.3d 123 (3d Cir. 2000) 33
UNR Indus., Inc., In re, 986 F.2d 207 (7th Cir. 1993) 21
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Woods v. *City Nat'l Bank & Trust Co.*, 312 U.S. 262 (1941) 32

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Bankruptcy Act, ch. 541, 30 Stat. 544 32
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11 U.S.C. 301(a) 2
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11 U.S.C. 330(a)(1) ..... *passim*
11 U.S.C. 330(a)(1)(A) ..... *passim*
11 U.S.C. 330(a)(2) 4, 26
11 U.S.C. 330(a)(3) 5, 6, 16
11 U.S.C. 330(a)(3)(A) 5
11 U.S.C. 330(a)(3)(B) 5
11 U.S.C. 330(a)(3)(D) 6
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11 U.S.C. 330(a)(3)(F) 5, 6, 19, 22, 25
11 U.S.C. 330(a)(4) 10
11 U.S.C. 330(a)(4)(A)(i) 6
11 U.S.C. 330(a)(4)(A)(ii) 6, 10, 25, 33
11 U.S.C. 330(a)(4)(A)(ii)(II) 33
11 U.S.C. 330(a)(4)(B) 3, 24
11 U.S.C. 330(a)(6) ..... *passim*
11 U.S.C. 331 20

Statutes, regulation and rules—Continued: Page

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11 U.S.C. 1201 *et seq.* (Ch. 12) 2, 3, 24
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Clean Air Act, 42 U.S.C. 7607(f) 20
Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(A) 19, 23
Fair Debt Collection Practices Act, 15 U.S.C. 1692k(a)(3) 19
Independent Counsel Act, 28 U.S.C. 593(f) 25
Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 928(a) 20
Prison Litigation Reform Act of 1995, 42 U.S.C. 1997e(d)(1)(A) 19
28 U.S.C. 581-589a 1
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42 U.S.C. 1988 ..... 10, 20
28 C.F.R. Pt. 58, App. A 1, 17
Fed. R. Bankr. P.:
Rule 2016(a) 4, 17, 26, 29
Rule 9011(c)(2) 30, 31
Rule 9014 18

Miscellaneous: Page

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p. 36,249 6
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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES
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INTEREST OF THE UNITED STATES

The compensation of attorneys and other professionals under 11 U.S.C. 330(a) is an issue of substantial importance to the United States. The Attorney General appoints United States Trustees to supervise the administration of bankruptcy cases and trustees throughout the country. 28 U.S.C. 581-589a. United States Trustees "may raise and may appear and be heard on any issue in any case or proceeding under" the Bankruptcy Code. 11 U.S.C. 307. United States Trustees are also authorized to review, comment on, and object to applications for compensation under Section 330(a) in accordance with guidelines promulgated by the Executive Office for United States Trustees. 28 U.S.C. 586(a)(3)(A); see 28 C.F.R. Pt. 58, App. A; 78 Fed. Reg. 36,248-36,276 (June 17, 2013). In

fiscal year 2013, United States Trustees filed nearly 700 objections to Section 330(a) fee applications.[1] The United States thus has a substantial interest in the proper interpretation and application of Section 330(a).

STATEMENT

1. This case concerns the interpretation of Section 330(a) of the Bankruptcy Code, which authorizes a bankruptcy court to award certain attorneys and other professionals reasonable compensation to be paid from the assets of the bankruptcy estate.

a. A debtor commences a voluntary bankruptcy case by filing a petition in bankruptcy court. 11 U.S.C. 301(a). The filing of the petition creates a bankruptcy estate generally comprising "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. 541(a)(1). In a Chapter 7 liquidation, the estate is placed under the control of a trustee appointed by the United States Trustee or elected by creditors. 11 U.S.C. 701-703. In most Chapter 11 reorganizations, no trustee is appointed and the debtor—known as the "debtor in possession"—administers the estate as a fiduciary for the estate's creditors. 11 U.S.C. 1101, 1107(a); see *Commodity Futures Trading Comm'n* v. *Weintraub*, 471 U.S. 343, 355-356 (1985). In debt-adjustment cases filed under Chapters 12 and 13, the debtor retains possession of the estate assets, but the bankruptcy process is overseen by an appointed trustee. 1 *Collier on Bankruptcy* ¶¶ 1.07[4]-[5], at 1-42 to 1-43

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[1] U.S. Dep't of Justice, *United States Trustee Program Annual Report, FY 2013*, at 27, http://www.justice.gov/ust/eo/public_affairs/ annualreport/docs/ar2013.pdf (last visited Dec. 9, 2014).

(Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2014) (*Collier*).

With the bankruptcy court's approval, a trustee may employ attorneys or other professionals to "represent or assist the trustee in carrying out the trustee's duties" under the Code. 11 U.S.C. 327(a); see *Lamie* v. *United States Tr.*, 540 U.S. 526, 531 (2004). A Chapter 11 debtor in possession has the same authority to retain professionals to assist in the reorganization process. 11 U.S.C. 1107(a). In addition to attorneys, the professionals employed under Section 327 include accountants, auditors, investment bankers, and management consultants. See Stephen J. Lubben, *Chapter 11 Professional Fee Study* 32 (Am. Bankr. Inst. 2007) (*Professional Fee Study*).

b. Unless the bankruptcy court approves the terms and conditions of employment in advance, the compensation of a professional employed under Section 327 is governed by 11 U.S.C. 330(a).[2] Section 330(a) also governs compensation for certain other persons, including professionals employed by Chapter 11 creditor committees and attorneys representing individual debtors in Chapter 12 and 13 cases. See 11 U.S.C. 330(a)(1) and (4)(B), 1103; *Lamie*, 540 U.S. at 540-541.

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[2] Under 11 U.S.C. 328(a), a court may approve in advance "reasonable terms and conditions of employment" for a professional. A compensation arrangement approved under Section 328(a) cannot be altered after the employment is concluded unless it proves "improvident in light of developments not capable of being anticipated." 11 U.S.C. 328(a). Section 328(a) thus "provides a mechanism to cement definite compensation terms at the beginning of a professional's engagement." 3 *Collier* ¶ 328.02, at 328-7.

Under Section 330(a), "the court may award * * * reasonable compensation for actual, necessary services rendered" by a professional, as well as "reimbursement for actual, necessary expenses." 11 U.S.C. 330(a)(1). Compensation awarded under Section 330(a) is treated as an administrative expense and is paid out of the assets of the bankruptcy estate before the claims of most unsecured creditors. 11 U.S.C. 503(b), 507(a); see *Law* v. *Siegel*, 134 S. Ct. 1188, 1195 (2014). When, as is typical, the estate's assets are insufficient to fund a complete repayment for creditors, "every dollar paid" in Section 330(a) professional fees "detracts from the unsecured creditors' recovery." Pet. App. 16a-17a.

An attorney or other professional seeking compensation under Section 330(a) must submit a detailed fee application to the bankruptcy court. Fed. R. Bankr. P. 2016(a). Creditors and other parties in interest, as well as the United States Trustee, must be notified of the application and may file objections. 11 U.S.C. 330(a)(1) and (2); 28 U.S.C. 586(a)(3)(A). In addition, "bankruptcy courts have an independent duty to review fee applications even absent objections," *In re Busy Beaver Bldg. Ctrs., Inc.*, 19 F.3d 833, 843 (3d Cir. 1994), and may *sua sponte* deny an application or award reduced compensation, 11 U.S.C. 330(a)(2); see 3 *Collier* ¶ 330.08[2][b][vi], at 330-69. Those safeguards are necessary in part because debtors and other parties in interest often will lack adequate financial incentives to monitor the reasonableness of fees that will be paid from the estate. See *Busy Beaver Bldg. Ctrs.*, 19 F.3d at 842-843.

c. Section 330(a)'s provisions governing the determination of reasonable compensation seek to au-

thorize fees sufficient to attract the services of talented professionals, while also protecting creditors from excessive or unreasonable fee requests.

Before the Bankruptcy Code was enacted in 1978, courts awarded bankruptcy professionals fees that were "at the lower end of the spectrum of reasonableness," on the theory that the professionals were acting "as officers of the court" and therefore "should not expect to be compensated as generously for their services as they might be were they privately employed." *In re First Colonial Corp. of Am.*, 544 F.2d 1291, 1299 (5th Cir.) (citation omitted), cert. denied, 431 U.S. 904 (1977). Section 330(a) reflects a deliberate departure from that approach. Congress determined that "the gain to the estate of employing able, experienced, expert counsel would outweigh the expense to the estate of doing so," and that "unless the estate paid competitive sums it could not retain such counsel on a regular basis." *Busy Beaver Bldg. Ctrs.*, 19 F.3d at 850; see H.R. Rep. No. 595, 95th Cong., 1st Sess. 329-330 (1977); 3 *Collier* ¶ 330.03[3], at 330-29.

Under the current version of the Bankruptcy Code, "the amount of reasonable compensation" awarded for services rendered by an attorney or other professional must be determined based on "the nature, the extent, and the value of such services, taking into account all relevant factors." 11 U.S.C. 330(a)(3). The statute identifies six non-exclusive considerations, including "the time spent on such services," "the rates charged for such services," and "whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title." 11 U.S.C.

330(a)(3)(A), (B) and (F).[3] That inquiry seeks to ensure that the compensation available to a professional employed by a bankruptcy trustee or debtor in possession is reasonable in comparison "to the market measured both by the [professional's] own billing practices * * * and by those of other comparable professionals." 78 Fed. Reg. at 36,249; see 3 *Collier* ¶ 330.03[3], at 330-29.

Congress also sought to protect creditors from excessive or unreasonable fee requests by limiting the services for which compensation may be sought. Section 330(a) permits compensation only for "actual, necessary services rendered." 11 U.S.C. 330(a)(1)(A). It further provides that, to be compensable, services must have been either "reasonably likely to benefit the debtor's estate" or "necessary to the administration of the case." 11 U.S.C. 330(a)(4)(A)(ii). And it prohibits compensation for any "unnecessary duplication of services." 11 U.S.C. 330(a)(4)(A)(i).

Finally, a court determining the amount of compensation available for particular work must consider "whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed." 11 U.S.C. 330(a)(3)(D). Congress specifically addressed the rates to be paid for the preparation of a fee application, directing that "[a]ny

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[3] In 2005, Congress amended Section 330(a)(3) by adding an additional factor and redesignating paragraph (E) as paragraph (F). Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 415, 119 Stat. 107. Although this case is governed by the prior version of the statute, see Pet. App. 87a n.24, this brief will cite the current version because the amendment is not relevant to the question presented.

compensation awarded" for that task must be "based on the level and skill reasonably required to prepare the application," rather than on the level of skill required for the professional's underlying services. 11 U.S.C. 330(a)(6).

2. Respondent is a copper mining, smelting, and refining company. Pet. App. 2a. In 2005, facing "cash flow deficiencies, various environmental liabilities, and tax and labor problems," it filed a Chapter 11 reorganization petition. *Ibid.* At the outset of the process, respondent's prospects for a successful reorganization appeared dim, and its creditors "were expected to receive cents on the dollar." *Id.* at 63a; see *id.* at 62a.

Respondent sought and obtained the bankruptcy court's approval to employ petitioners to provide legal representation during the reorganization. Pet. App. 26a-27a, 153a. *Inter alia*, petitioners successfully prosecuted fraudulent-transfer claims against respondent's parent company, ultimately securing for the estate a judgment "valued at between $7 and $10 billion." *Id.* at 3a. That award was apparently "the largest fraudulent transfer judgment in Chapter 11 history." *Ibid.*

In combination with other factors, the fraudulent-transfer recovery contributed significantly to a successful reorganization in which all of respondent's creditors were paid in full. Pet. App. 3a, 24a. In 2009, respondent emerged from Chapter 11 as a healthy company "with little debt, $1.4 billion in cash, and the successful resolution of its environmental" and other liabilities. *Id.* at 3a. Respondent's parent then reassumed control over the company. *Ibid.*

3. Petitioners sought compensation under Section 330(a). After extensive proceedings in the bankruptcy

and district courts, petitioners were awarded approximately $129 million in fees. Pet. App. 3a-4a.[4]

a. Petitioners requested approximately $120 million in compensation for their "core" work on the bankruptcy case, a 20% enhancement of those core fees, and compensation for time spent preparing their fee applications and litigating fee issues. Pet. App. 3a. Respondent raised numerous objections to petitioners' fee applications and sought extensive discovery. *Ibid.* The United States Trustee objected to petitioners' requested fee enhancement, but did not object to the other aspects of their fee applications. *Id.* at 58a-59a.

After a six-day trial, the bankruptcy court rejected respondent's challenges to petitioners' core fee requests and awarded approximately $120 million in core fees. Pet. App. 3a; see *id.* at 86a-130a. The court also determined that petitioners were entitled to a 20% enhancement of their fees for work on the fraudulent-transfer action (but not, as petitioners had originally sought, for all of their work in the case). *Id.* at 3a, 130a-135a. That enhancement yielded an additional award of roughly $4.2 million. *Id.* at 135a.

The bankruptcy court granted in part petitioners' requests for compensation for time spent preparing their fee applications and litigating fee issues. Petitioners had sought more than $8 million in compensation for fee-related work. Pet. App. 57a. Although the

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[4] Petitioners filed separate fee applications, and the lower courts' treatment of those applications differed in certain respects not relevant to the question presented. For simplicity, this brief refers to petitioners' applications collectively and cites the bankruptcy and district court opinions addressing the application filed by petitioner Baker Botts L.L.P., which sought and received the vast majority of the total fee award.

court held that Section 330(a) permits the award of compensation for the preparation and successful defense of a fee application, it concluded that the fees petitioners sought for that work were "higher than were reasonable or necessary" under the circumstances. *Id.* at 142a; see *id.* at 135a-143a. The court therefore reduced the fee-related portion of petitioners' award to approximately $5 million. *Id.* at 4a, 142a.

b. The district court affirmed in part, reversed in part, and remanded. Pet. App. 22a-54a. As relevant here, respondent dropped its challenges to petitioners' core fees and disputed only the enhancement and the award for petitioners' preparation and defense of their fee applications. *Id.* at 4a, 28a-29a.

The district court affirmed the enhancement. Pet. App. 35a-45a. The court further held that Section 330(a) generally permits compensation for the successful defense of a fee application. *Id.* at 45a-46a. The court agreed with the United States Trustee, however, that a professional is not entitled to compensation for time spent seeking an enhancement to its core fees. *Id.* at 28a-29a, 48a-49a. The court also held that petitioners should not be compensated for any work done to correct deficiencies in their original fee applications. *Id.* at 49a. Because the court could not ascertain whether the bankruptcy court's award included compensation for those non-compensable tasks, it remanded for further proceedings. *Id.* at 50a.

c. On remand, the bankruptcy court reinstated its original award of $5 million, explaining that no part of that sum was attributable to time spent seeking a fee enhancement or correcting deficiencies in petitioners'

original fee applications. Pet. App. 147a-151a. The district court affirmed. *Id.* at 157a-166a.

4. The court of appeals affirmed the fee enhancement but reversed the award for petitioners' fee defense, holding that "Section 330(a) does not authorize compensation for the costs counsel or professionals bear to defend their fee applications." Pet. App. 14a; see *id.* at 1a-21a.[5] The court relied on 11 U.S.C. 330(a)(4)(A)(ii), which states that professional services are compensable only if they are either "reasonably likely to benefit the debtor's estate" or "necessary to the administration of the case." See Pet. App. 15a. The court held that the defense of a fee application does not satisfy either criterion because "[t]he primary beneficiary of a professional fee application * * * is the professional" rather than the estate. *Ibid.* The court also relied on Section 330(a)(6), which contemplates an award of compensation for "the *preparation* of a fee application," 11 U.S.C. 330(a)(6) (emphasis added), but does not address the *defense* of a fee application. Pet. App. 15a-16a.[6]

The court of appeals acknowledged that, under federal fee-shifting statutes such as 42 U.S.C. 1988, "time spent to prepare, litigate and appeal a fee award is often compensable." Pet. App. 17a. The court explained, however, that fee-shifting statutes reflect a congressional determination that "the losing party should bear the full costs of counsel for the winner."

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[5] Petitioners did not appeal the portion of the district court's decision denying compensation for time spent seeking an enhancement of their core fees. Pet. App. 4a-5a.

[6] In an apparent typographical error, two sentences in the court of appeals' opinion refer to this provision as Section 330(a)(4) rather than Section 330(a)(6). See Pet. App. 16a.

Ibid. The court believed that "the equities are quite different" in the context of Section 330(a), where there is a "limited pool of assets" and "[n]o side wears the black hat." *Ibid.*

Finally, the court of appeals rejected petitioners' arguments that refusing to award defense fees under Section 330(a) would (1) dilute a professional's effective compensation to a level below what a comparably skilled practitioner would earn outside of bankruptcy and (2) invite meritless objections to fee applications. Pet. App. 18a-21a. The court described its approach as preserving "rough comparability" between bankruptcy and nonbankruptcy cases, and it suggested that bankruptcy professionals could recoup the anticipated costs of defending their fee applications by increasing their rates for core services. *Id.* at 18a; see *id.* at 18a n.7. The court also observed that bankruptcy courts should respond to frivolous objections to fee applications by applying "the exception to the American Rule that allows fee shifting where an adverse party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Id.* at 21a (citing *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 45-46 (1991)).

SUMMARY OF ARGUMENT

I. Section 330(a) permits an award of compensation for the defense of a fee application when such an award is necessary and appropriate to ensure that a professional receives reasonable compensation for its services in the underlying bankruptcy case.

A. Bankruptcy courts determine awards of compensation under Section 330(a) using the lodestar method, which multiplies the number of hours reasonably expended by a reasonable hourly rate. The result, subject to any appropriate adjustments, by defi-

nition constitutes "reasonable compensation" for a professional's services. To obtain that compensation, however, the professional must file an application with the court and may be required to litigate objections. If a professional reasonably devotes additional time to the successful defense of its fee application but receives no additional compensation for that time, its compensation for services rendered in the underlying bankruptcy case may be effectively diluted to something less than the "reasonable compensation" required by Section 330(a).

Decisions interpreting federal fee-shifting statutes confirm that Section 330(a) permits compensation for the defense of a fee application in appropriate cases. Like Section 330(a), fee-shifting statutes typically do not expressly address fee defense. Nonetheless, courts have held with near unanimity that those statutes permit compensation for time reasonably spent successfully defending a fee application because the denial of such compensation would effectively dilute the fees awarded for work done on the merits of the case. Like Section 330(a), fee-shifting statutes provide for awards of "reasonable" compensation and seek to ensure remuneration comparable to what a professional would receive for performing equivalent work for a paying client. The fee-shifting precedents thus provide highly instructive guidance on the proper interpretation of Section 330(a).

Section 330(a)(6) further confirms that fee defense is compensable in appropriate cases by specifically addressing the amount of compensation available for the *preparation* of a fee application. Because Section 330(a)(6) does not itself authorize compensation for that task, it indicates that such authorization is in-

cluded in Section 330(a)(1)'s general provision for an award of "reasonable compensation." And if Section 330(a)(1) permits compensation for time spent *preparing* a fee application, there is no apparent reason to conclude that it categorically bars compensation for time spent *defending* the same application.

B. The contrary arguments advanced by respondent and the court of appeals lack merit. The court of appeals correctly held that the defense of a fee application is not *itself* a compensable service within the meaning of Section 330(a). It does not follow, however, that a professional should never be paid for the defense of its fee application. Instead, compensation for such work is properly viewed as part of the compensation *for the underlying services* in the bankruptcy case. Respondent is likewise wrong in contending that fee defense is not compensable because professionals are generally required to bear their own costs when litigating fee disputes with clients outside of bankruptcy. Unlike their nonbankruptcy counterparts, professionals seeking compensation under Section 330(a) must obtain court approval before they can be paid, and they potentially face objections to their fee applications from parties other than their clients.

C. Although the court of appeals erred in holding that the defense of a fee application is never compensable, fee-defense work should be compensated only to the extent necessary to preserve the reasonableness of a professional's compensation for core services. Accordingly, as under fee-shifting statutes, compensation should be awarded only if, and to the extent that, the underlying application is approved. Moreover, fees should be awarded only for time *reasonably* spent on fee defense—unnecessary or unreasonable work

and time devoted to curing deficiencies in an original application are not compensable. Finally, because the burden of an award under Section 330(a) ordinarily falls on innocent creditors rather than on the party that instigated the fee dispute, courts should respond to frivolous or abusive fee objections by imposing sanctions on the objecting party rather than by awarding additional compensation under Section 330(a).

II. Although much of petitioners' analysis is consistent with the approach set forth in this brief, petitioners rely on a different interpretation of Section 330(a)'s text. In petitioners' view, work performed in defending a fee application *itself* constitutes "services rendered" under Section 330(a)(1)(A) for which a professional should receive "reasonable compensation." That interpretation is contrary to the most natural reading of the statutory text because the phrase "services rendered" connotes work performed on behalf of a client and does not encompass a professional's effort to secure compensation for itself. Moreover, although petitioners appear to agree that the defense of a fee application is compensable only to the extent it is successful, it is not readily apparent how that limitation could be grounded in the statute if fee defense were itself a compensable service under Section 330(a).

ARGUMENT

The court of appeals erred in holding that Section 330(a) categorically prohibits an award of fees for the defense of a bankruptcy professional's fee application. When a law firm successfully responds to objections asserted against its Section 330(a) fee application, the additional time spent on the fee defense dilutes the firm's compensation and effectively reduces the hour-

ly rate it receives for services rendered in the underlying bankruptcy. In such circumstances, Section 330(a) may authorize an award of fees for work performed in defending the firm's fee application. The most persuasive textual basis for that conclusion is not (as petitioners contend) that the hours spent defending a fee application qualify as independently compensable "services rendered" within the meaning of 11 U.S.C. 330(a)(1)(A). Rather, compensation for fee defense is sometimes necessary and appropriate to ensure that a professional receives "reasonable compensation" for core services rendered in the underlying bankruptcy case. 11 U.S.C. 330(a)(1)(A).[7]

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[7] In the district court, the United States Trustee filed briefs contending, *inter alia*, that Section 330(a) does not authorize an award of fees for time spent pursuing a fee enhancement. See 2:11-cv-290 Docket entry No. (Docket entry No.) 12, at 22-30 (Nov. 23, 2011); Docket entry No. 19, at 14-16 (Jan. 13, 2012). Although the United States Trustee did not challenge the award of fees for petitioners' successful defense of their core fee awards, its briefs stated that Section 330(a) bars compensation for fee defense in all circumstances. *Ibid.* Those statements are inconsistent with guidelines subsequently issued by the Executive Office for United States Trustees, which provide that compensation for fee defense is "generally" inappropriate but recognize a "judicial exception" for time spent "litigating an objection to the application where the applicant substantially prevails." 78 Fed. Reg. at 36,250; see *id.* at 36,269, 36,271. This brief adopts a similar position and reflects the government's considered views on the issue.

I. SECTION 330(a) AUTHORIZES AN AWARD OF FEES FOR THE DEFENSE OF A FEE APPLICATION TO THE EXTENT NECESSARY TO PROVIDE REASONABLE COMPENSATION FOR CORE SERVICES

A. The Categorical Denial Of Defense Fees Would Contravene Section 330(a) By Diluting Compensation For Core Services

1. Section 330(a) provides for the award of "reasonable compensation for actual, necessary services rendered" by attorneys and other professionals. 11 U.S.C. 330(a)(1)(A). In determining the amount of compensation that is "reasonable," courts must "consider the nature, the extent, and the value" of the services, "taking into account all relevant factors," including the time spent, the rates charged, and "whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners" in nonbankruptcy cases. 11 U.S.C. 330(a)(3).

Bankruptcy courts performing that task typically apply the lodestar approach, under which "the number of hours reasonably expended by a professional is multiplied by a reasonable hourly rate to arrive at a reasonable fee," which may in some cases be adjusted further based on additional factors. 2 Hon. William L. Norton, Jr. & William L. Norton III, *Norton Bankruptcy Law and Practice* § 31:5, at 31-12 (3d ed. 2014); see, *e.g.*, *In re Market Ctr. E. Retail Prop., Inc.*, 730 F.3d 1239, 1246-1247 (10th Cir. 2013); *In re Sullivan*, 674 F.3d 65, 68-69 (1st Cir. 2012); *In re Eliapo*, 468 F.3d 592, 598-599 (9th Cir. 2006); Pet. App. 6a-7a. The lodestar approach was developed in the context of fee-shifting statutes. It reflects this Court's judgment that "[t]he most useful starting

point for determining the amount of a reasonable fee is the number of hours reasonably expended * * * multiplied by a reasonable hourly rate." *Hensley* v. *Eckerhart*, 461 U.S. 424, 433 (1983). When the lodestar method is applied to a bankruptcy professional's core services, subject to any appropriate adjustments, the result "by definition will represent the reasonable worth of the services rendered." *Blanchard* v. *Bergeron*, 489 U.S. 87, 96 (1989).

To obtain that compensation, however, an attorney or other bankruptcy professional must submit to the bankruptcy court a detailed fee application. See Fed. R. Bankr. P. 2016(a); see also 28 C.F.R. Pt. 58, App. A (guidelines for Section 330(a) fee applications promulgated by the Executive Office for United States Trustees); 78 Fed. Reg. at 36,251-36,254 (guidelines for applications by attorneys seeking compensation in large Chapter 11 cases). Before fees may be awarded, the parties in interest and the United States Trustee must have an opportunity to review and object to the fee application. See 11 U.S.C. 330(a)(1); 28 U.S.C. 586(a)(3)(A).

Most fee applications are approved without objection. See *In re Busy Beaver Bldg. Ctrs., Inc.*, 19 F.3d 833, 842 (3d Cir. 1994); *Professional Fee Study* 35. In other cases, questions or objections are raised by the parties in interest, the United States Trustee, or the bankruptcy court, but are resolved through the clarification or supplementation of the application or the withdrawal of an unjustified request for payment. See *In re Computer Learning Ctrs., Inc.*, 285 B.R. 191, 223-224 (Bankr. E.D. Va. 2002). Sometimes, however, fee disputes give rise to extensive litigation. See *id.* at 223. An objection to a fee application triggers a "con-

tested matter" under the Federal Rules of Bankruptcy Procedure, which can involve discovery, written briefing, and a hearing or trial. See Fed. R. Bankr. P. 9014; see also Pet. App. 3a (describing extensive discovery and a six-day fee trial).

If a professional reasonably devotes significant time to the successful defense of its fee application but receives no additional compensation, the inevitable result is to "dilute its compensation for 'actual and necessary services'" rendered in the underlying bankruptcy case. *In re Smith*, 317 F.3d 918, 929 (9th Cir. 2002), cert. denied, 538 U.S. 1032 (2003). In the proceedings below, for example, the bankruptcy court determined that petitioners reasonably devoted time worth approximately $5 million to the defense of their fee applications. Pet. App. 4a. The court of appeals acknowledged that, by denying compensation for that time, it was diluting the core fee received by petitioner Baker Botts L.L.P. by roughly 4.4%. *Id.* at 18a-19a. In smaller cases, the costs of a fee defense can be considerably larger in relation to the professional's total fees. See, *e.g.*, *Smith*, 317 F.3d at 922 (defense fees and costs were more than 25% of core fees); *In re Buckridge*, 367 B.R. 191, 206-207 & n.26 (Bankr. C.D. Cal. 2007) (defense fees were approximately 8% of core fees).

The denial of compensation for a successful fee defense thus effectively results in a "reduction of the rate paid for all the attorneys' services" in the underlying proceeding. *In re Nucorp Energy, Inc.*, 764 F.2d 655, 662 (9th Cir. 1985) (*Nucorp*). That dilution of a core fee award contravenes Section 330(a)'s provision for "reasonable compensation" for core services. It also undermines the policies underlying Section

330(a)—and the statute's express direction to consider "the customary compensation charged by comparably skilled [nonbankruptcy] practitioners," 11 U.S.C. 330(a)(3)(F)—by "reduc[ing] the effective compensation of bankruptcy attorneys to levels below the compensation available to attorneys generally." *Smith*, 317 F.3d at 928.

2. Decisions interpreting federal fee-shifting statutes confirm that, in appropriate circumstances, an award of "reasonable" professional fees may include compensation for the successful defense of a fee application. Many federal statutes require the payment of "reasonable" attorney's fees under specified circumstances. See *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 562 (1986). Like Section 330(a), those statutes do not expressly provide for an award of fees for work performed defending a fee application. Nonetheless, courts have held with near-unanimity that "[r]easonable time expended in applying for statutory fees and litigating statutory fee issues is compensable." Alba Conte, *Attorney Fee Awards* § 4:21, at 528 (3d ed. 2004); accord 1 Robert L. Rossi, *Attorneys' Fees* § 6:15, at 6-60 to 6-62 & n.1 (3d ed. 2014) (Rossi).

In *Commissioner, INS* v. *Jean*, 496 U.S. 154 (1990), for example, this Court concluded that fee-defense work is compensable under the Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(A). See 496 U.S. at 158, 161-166. Courts of appeals have reached the same result in applying numerous other fee-shifting statutes. See, *e.g.*, *Camacho* v. *Bridgeport Fin., Inc.*, 523 F.3d 973, 981 (9th Cir. 2008) (Fair Debt Collection Practices Act, 15 U.S.C. 1692k(a)(3)); *Hernandez* v. *Kalinowski*, 146 F.3d 196, 200 (3d Cir. 1998) (Prison Litigation

Reform Act of 1995, 42 U.S.C. 1997e(d)(1)(A)); *Anderson* v. *Director, Office of Workers Comp. Programs*, 91 F.3d 1322, 1325 (9th Cir. 1996) (Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 928(a)); *American Petroleum Inst.* v. *EPA*, 72 F.3d 907, 918 (D.C. Cir. 1996) (Clean Air Act, 42 U.S.C. 7607(f)); *American Fed'n of Gov't Emps., AFL-CIO, Local 3882* v. *FLRA*, 994 F.2d 20, 21-23 (D.C. Cir. 1993) (Back Pay Act of 1966, 5 U.S.C. 5596); *Cruz* v. *Hauck*, 762 F.2d 1230, 1233-1234 (5th Cir. 1985) (42 U.S.C. 1988); *Gagne* v. *Maher*, 594 F.2d 336, 344 (2d Cir. 1979) (same), aff'd, 448 U.S. 122 (1980); *Lund* v. *Affleck*, 587 F.2d 75, 77 (1st Cir. 1978) (same).

Although these decisions have sometimes relied on features specific to the particular fee-shifting statutes at issue, they have principally applied the anti-dilution rationale described above. In *Jean*, for example, this Court quoted with approval the Second Circuit's observation that "denying attorneys' fees for time spent in obtaining them would dilute the value of a fees award by forcing attorneys into extensive, uncompensated litigation." 496 U.S. at 162 (quoting *Gagne*, 594 F.2d at 344) (internal quotation marks omitted). Other courts have likewise reasoned that "if an attorney is not compensated for the time expended on the fee request, the net effect would be to reduce the attorney's hourly rate for all the hours worked on the case," thereby rendering the underlying award unreasonably low. Rossi § 6:15, at 6-60 to 6-61; see, *e.g.*, *Camacho*, 523 F.3d at 981; *Cruz*, 762 F.2d at 1234; *Lund*, 587 F.2d at 77.[8]

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[8] This Court applied analogous reasoning in holding that fee-shifting statutes permit "an appropriate adjustment" to an attor-

This Court has held that its "case law construing what is a 'reasonable' fee applies uniformly" to all federal fee-shifting statutes using that formulation. *City of Burlington* v. *Dague*, 505 U.S. 557, 562 (1992). And courts of appeals have further concluded that "the general principles applicable under fee-shifting statutes" provide guidance when analogous issues arise under Section 330(a), which likewise calls for an award of "reasonable" compensation. *In re UNR Indus., Inc.*, 986 F.2d 207, 210 (7th Cir. 1993); accord *In re Manoa Fin. Co.*, 853 F.2d 687, 690-691 (9th Cir. 1988). Accordingly, the decisions holding that fees for the successful defense of a fee request are an integral component of "reasonable" compensation under federal fee-shifting statutes confirm that such defense fees should also be available under Section 330(a).

3. Although considerations unique to bankruptcy may provide reason to depart from fee-shifting precedents in resolving other questions arising under Section 330(a), no such considerations apply here. To the contrary, Section 330(a) shares the features of fee-shifting statutes that make awards of defense fees appropriate. In the fee-shifting context, "a reasonable attorney's fee is one that is adequate to attract competent counsel, but that does not produce windfalls to attorneys." *Blum* v. *Stenson*, 465 U.S. 886, 897 (1984) (citation, brackets, ellipsis, and internal quotation marks omitted). The court's task is thus to determine

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ney's hourly rates to account for the fact that payment is delayed until the conclusion of the litigation. *Missouri* v. *Jenkins*, 491 U.S. 274, 284 (1989); see *Perdue* v. *Kenny A.*, 559 U.S. 542, 556 (2010). (The same issue does not arise in bankruptcy cases because professionals may seek periodic interim awards of compensation. See 11 U.S.C. 331.)

an award that "*roughly* approximates the fee that the * * * attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case." *Perdue* v. *Kenny A.*, 559 U.S. 542, 551 (2010).

Section 330 "is similar to fee-shifting statutes in the important respect that it is intended to attract competent counsel by awarding reasonable compensation for services rendered." *Manoa Fin. Co.*, 853 F.2d at 691. Like fee-shifting provisions, Section 330(a) seeks to ensure that professionals receive "compensation comparable to what they would receive" from paying clients. *In re Taxman Clothing Co.*, 49 F.3d 310, 313 (7th Cir. 1995); see 11 U.S.C. 330(a)(3)(F). And also like fee-shifting statutes, Section 330(a) reflects an "express directive" that attorneys should receive "reasonable" compensation. *Nucorp*, 764 F.2d at 662. The anti-dilution rationale that courts have applied to fee-shifting statutes thus applies with equal force in the context of Section 330(a).

The court of appeals in this case observed that, unlike awards under fee-shifting statutes, the costs of an award under Section 330(a) are ordinarily borne by unsecured creditors rather than by the losing party in litigation. Pet. App. 17a-18a. The court also emphasized that, in this context, "[n]o side wears the black hat." *Id.* at 17a. But the purpose of fee-shifting statutes is not to punish the losing party in litigation.[9] Instead, it is to provide compensation "sufficient to induce a capable attorney to undertake [a] representa-

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[9] Indeed, this Court has observed that fee awards in civil rights cases are often paid by "state and local taxpayers" rather than "by the individuals responsible for the constitutional or statutory violations on which the judgment is based." *Perdue*, 559 U.S. at 559.

tion." *Perdue*, 559 U.S. at 552; see *Blum*, 465 U.S. at 897. Section 330(a) serves substantially the same function and should be given a similar interpretation.

4. Section 330(a)(6) reinforces the conclusion that compensation for the defense of a fee application is available in appropriate cases. That provision specifies that "[a]ny compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application." 11 U.S.C. 330(a)(6). That directive necessarily presupposes that compensation for the preparation of a fee application is authorized by Section 330(a)(1)'s provision for an award of "reasonable compensation" for services rendered. Section 330(a)(1) permits such compensation "because the preparation of a fee application is not required for lawyers practicing in areas other than bankruptcy" and demands work beyond "routine billing activities" associated with nonbankruptcy practice. 78 Fed. Reg. at 36,250. Compensation for the additional work required to prepare a fee application is thus necessary to avoid diluting a professional's compensation for core services.

If Section 330(a)(1) permits compensation for the *preparation* of a fee application, there is no apparent reason to conclude that it does not also permit compensation for the *defense* of a fee application. Indeed, this Court squarely rejected an effort to draw an analogous distinction in the context of the Equal Access to Justice Act, finding "no textual or logical argument for treating so differently a party's preparation of a fee application and its ensuing efforts to support that same application." *Jean*, 496 U.S. at 162; accord *Kinney* v. *International Bhd. of Elec. Workers*, 939 F.2d 690, 694 n.4 (9th Cir. 1991) ("There is no difference in

principle between the time spent preparing a fee application and the time spent successfully defending the application in litigation.").

Respondent and the court of appeals have not identified a principled basis on which to distinguish between preparing an application and defending it. Instead, they view Section 330(a)(6) as an independent grant of authority to award compensation for the preparation of a fee application, and they infer from the absence of a specific authorization for defense fees that such fees are unavailable. Pet. App. 15a-16a; Br. in Opp. 20-23. But that interpretation founders on Section 330(a)(6)'s text, which contains no affirmative grant of authority and which differs markedly from the provisions of Section 330(a) authorizing awards. Cf. 11 U.S.C. 330(a)(1) ("the court may award" compensation and expenses); 11 U.S.C. 330(a)(4)(B) ("the court may allow reasonable compensation to the debtor's attorney" in cases under Chapters 12 and 13). Instead, Section 330(a)(6) imposes a *restriction* on "[a]ny compensation awarded for the preparation of a fee application." It is thus "framed not as a conferral of authority but as a limitation of authority that already exists" in Section 330(a)(1). *Setser* v. *United States*, 132 S. Ct. 1463, 1469 (2012).

B. The Arguments Advanced In Favor Of A Complete Ban On Compensation For Fee-Defense Work Lack Merit

1. In holding that defense fees are categorically unavailable, the court of appeals principally relied on its conclusion that the defense of a fee application is not compensable under Section 330(a) because it is neither "reasonably likely to benefit the debtor's estate" nor "necessary to the administration of the

case." 11 U.S.C. 330(a)(4)(A)(ii); see Pet. App. 14a-15a. As explained in Part II, see pp. 31-34, *infra*, the court reached the correct conclusion in holding that the defense of a fee application does not *itself* qualify as an independently compensable service under Section 330(a). It does not follow, however, that a professional should never be paid for work performed in defending its fee application. Instead, compensation for such work is properly viewed as part of the compensation *for the underlying services* in the bankruptcy proceeding. Respondent did not challenge the bankruptcy court's determination that the underlying services at issue here were compensable under the governing statutory criteria. As with fees incurred in preparing a fee application, an award of fees incurred in defending the application may be appropriate and necessary to ensure that petitioners' compensation for those underlying services is "reasonable."[10]

2. Respondent contends (Br. in Opp. 24-25) that Section 330(a)(3)(F)'s directive to consider fees earned

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[10] The D.C. Circuit reached a different conclusion in interpreting the fee-shifting provision of the Independent Counsel Act, 28 U.S.C. 593(f), which in some cases permits the subject of an independent counsel investigation to recover fees incurred "during" the investigation. The D.C. Circuit held that this provision does not authorize an award of fees for "preparing the fee application" because those fees are not incurred "during" the investigation. *In re Olson*, 884 F.2d 1415, 1427 (1989) (per curiam). Acknowledging that the issue was a "close" one, the court rested its decision on the principle that "any waiver of sovereign immunity must be strictly construed," and on legislative history indicating that Congress did not intend fee-related work to be compensable. *Id.* at 1427-1428; see *id.* at 1427 n.19. Neither consideration applies here. And the Independent Counsel Act contains no analogue to 11 U.S.C. 330(a)(6), which presupposes that fees for preparing a fee application *are* available.

for comparable services outside the bankruptcy context supports the denial of awards for fee defense because nonbankruptcy lawyers generally must bear their own costs when they litigate fee disputes with clients. That comparison is inapt. Billings submitted by nonbankruptcy professionals are typically subject to dispute *only* by the clients with whom the professionals have contractual relationships. By contrast, bankruptcy professionals retained by a trustee or debtor in possession must file extensive applications to obtain court approval for their fees, and their applications are subject to objections from numerous parties in interest (including debtors and creditors), the United States Trustee, and the bankruptcy court itself. See 11 U.S.C. 330(a)(1) and (2); Fed. R. Bankr. P. 2016(a); see also *Nucorp*, 764 F.2d at 658-659.

The Fifth Circuit's categorical ban on fees for defense of a fee application thus will not produce equality of treatment between bankruptcy and nonbankruptcy professionals. To the contrary, bankruptcy professionals are for this purpose more similarly situated to lawyers seeking compensation under fee-shifting statutes, whose fee requests are also subject to court approval and objections from adverse parties—and who are typically compensated for time spent successfully litigating fee matters.

C. In Many Cases, Compensation For Fee-Defense Work Will Not Be Necessary To Preserve The Reasonableness Of A Professional's Compensation For Core Services

For the reasons stated above, the court of appeals erred in holding that fee-defense work is *never* compensable under Section 330(a). Such awards, however, are not *always* available. Rather, Section 330(a) and

decisions interpreting fee-shifting statutes establish important limitations that will often bar compensation for fee defense. The basic principle behind those limitations is that fee-defense work should be compensated only to the extent necessary to preserve the reasonableness of a professional's compensation for core services. Section 330(a) seeks to ensure that professionals have adequate incentives to perform core services in bankruptcy proceedings. Congress did not intend, however, to encourage fee litigation for its own sake or to make such litigation an independent source of profitable work for lawyers.

1. Most fundamentally, fees for defending a fee application should be awarded only if, and to the extent that, the application is approved. If the bankruptcy court rejects proffered objections and approves the fee application, additional fees for defending the application may be necessary to ensure that the professional receives reasonable compensation for its core services. But if the court concludes that the objections to the fee application have merit—*i.e.*, that the underlying services are wholly or partially non-compensable—that anti-dilution rationale does not apply.

Consistent with that principle, courts that permit compensation of fee-defense work under Section 330(a) have generally held that compensation is available only when a professional "*successfully* defend[s] its fee awards." *Smith*, 317 F.3d at 929; see, *e.g.*, *Manoa Fin. Co.*, 853 F.2d at 691. For the same reason, when a professional is only partially successful in responding to objections asserted against a request for fees, fees should not be awarded for any aspects of the fee-application defense that did not ultimately

succeed. See, *e.g.*, *In re Big Rivers Elec. Corp.*, 252 B.R. 670, 674-676 (W.D. Ky. 2000) (denying fees for "unsuccessfully defending [a] portion of [a] fee award"); *In re Quigley Co.*, 500 B.R. 347, 370-371 (Bankr. S.D.N.Y. 2013) (reducing defense fees in light of partial disallowance of core fees originally sought).

That approach is well-grounded in decisions interpreting fee-shifting statutes. In *Jean*, this Court directed that "fees for fee litigation should be excluded to the extent that the applicant ultimately fails to prevail in such litigation." 496 U.S. at 163 n.10. By way of example, the Court explained that, "if [a] challenge to a requested rate for paralegal time resulted in the court's recalculating and reducing the award for paralegal time from the requested amount, then the applicant should not receive fees for the time spent defending the higher rate." *Ibid.*; see, *e.g.*, *Thompson* v. *Gomez*, 45 F.3d 1365, 1367-1368 (9th Cir. 1995).

Limiting compensation to the successful defense of fee applications also furthers "the large objectives" of Section 330(a), a consideration on which this Court has often relied in "limit[ing] courts' discretion to award fees despite the absence of express legislative restrictions." *Martin* v. *Franklin Capital Corp.*, 546 U.S. 132, 139-140 (2005). Awarding fees for the successful defense of a fee application protects professionals' core fees from unreasonable dilution. At the same time, denying compensation for the unsuccessful defense of a fee application discourages unjustified fee requests and encourages settlement of fee disputes. If, in contrast, defense fees were available even for unsuccessful fee claims, professionals "would have every incentive to feather their nests" through exorbitant fee requests and excessive fee litigation, and

creditors and United States Trustees would be discouraged from raising "legitimate objections to improper billing entries." *Thompson*, 45 F.3d at 1368; see *In re Wind N' Wave*, 509 F.3d 938, 943-944 (9th Cir. 2007) ("compensating unsuccessful litigation over fee applications might lead to frivolous fee requests").

2. Even when a fee applicant ultimately succeeds in defending its fee application, compensation should not be awarded to the extent that the amounts requested for fee defense reflect excessive rates or hours, unnecessary work, or other unreasonable practices. In this case, for example, the bankruptcy court reduced petitioners' award because the defense fees petitioners originally sought were "higher than were reasonable or necessary" to defend their fee applications. Pet. App. 142a. That analysis was consistent with decisions interpreting fee-shifting statutes, which permit compensation only for time "*reasonably* spent" in establishing a right to a fee award. *Gagne*, 594 F.2d at 344 (emphasis added); see *Jean*, 496 U.S. at 163 ("Exorbitant, unfounded, or procedurally defective fee applications * * * are matters that the district court can recognize and discount.").

In addition, a professional should not receive compensation for time spent curing deficiencies or omissions in its original application. Professionals are required to maintain accurate time records and to justify their requests for fees. See Fed. R. Bankr. P 2016(a); 3 *Collier* ¶¶ 330.03[5]-[6], at 330-30 to 330-33. Accordingly, a professional's core fee award is not improperly diluted by the denial of compensation for time spent responding to requests for clarification or additional information made by the court or by the

United States Trustee.[11] And, as the district court recognized in this case, a professional also should not be paid for time spent in litigation to correct "insufficiently described" or "otherwise deficient" aspects of its original fee request. Pet. App. 49a; accord *Quigley Co.*, 500 B.R. at 370-371.

3. If a court determines that compensation for fee-defense work is necessary to provide reasonable compensation in a case where the objections to a professional's fee application were frivolous or otherwise abusive, it should ordinarily consider whether its authority to sanction improper litigation practices provides a more appropriate source for an award of fees. This case is unusual because respondent's creditors were paid in full and the cost of any award of defense fees under Section 330(a) will fall on respondent, the same party that instigated the litigation giving rise to the bankruptcy court's fee-defense award. In a more typical case, the burden of a Section 330(a) award for fee defense will fall on unsecured creditors, most or all of whom may have had no involvement in raising the objections that gave rise to the fee litigation.

When such objections are frivolous, brought in bad faith, or abusively litigated, a bankruptcy court may require the objecting party to pay attorney's fees under Federal Rule of Bankruptcy Procedure 9011(c)(2), or under the court's inherent power to impose sanctions where a litigant has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Cham-*

---

[11] In addition, responding to such inquiries will often be analogous to "reviewing a bill with a client, answering the client's questions and addressing the client's concerns"—routine activities that are not billed to clients outside the bankruptcy context. *Computer Learning Ctrs.*, 285 B.R. at 223.

bers v. *NASCO, Inc.*, 501 U.S. 32, 45-46 (1991) (citations omitted); see Pet. App. 21a. Such sanctions place the burden of defense fees on the responsible party rather than on innocent creditors. Accordingly, if a bankruptcy court concludes that a fee objection is sanctionable under *Chambers* or Rule 9011(c)(2), it would likely be an abuse of discretion to award fees under Section 330(a) instead.

II. WORK PERFORMED DEFENDING A FEE APPLICATION DOES NOT CONSTITUTE INDEPENDENTLY COMPENSABLE "SERVICES RENDERED" UNDER SECTION 330(a)

Much of petitioners' analysis is consistent with the argument outlined in Part I. While petitioners do not address all of the limitations on a court's authority to award defense fees under Section 330(a), they appear to agree that such fees are available only to the extent that the fee application is "successful[]." *E.g.*, Pet. Br. 17, 22. Petitioners also emphasize (Br. 23) that "[a] statutory grant of authority to award reasonable attorneys' fees necessarily includes discretion to award defense fees to avoid dilution of the core fees previously earned."

Petitioners' textual basis for preventing such dilution, however, differs from the analysis set forth above. In the government's view, Section 330(a)(1)(A)'s reference to compensable "services rendered" is limited to work performed in the underlying bankruptcy case. The justification for awarding additional fees for fee-defense work is that such fees are sometimes necessary and appropriate to ensure that the professional's compensation for the *underlying* services is "reasonable." In petitioners' view, by contrast, work performed in successfully defending a fee

application *itself* constitutes "services rendered" for which the professional should receive "reasonable compensation" under Section 330(a)(1)(A). See Pet. Br. 23-30. That interpretation should be rejected because it is contrary to the most natural reading of the statutory text and could produce anomalous practical results.

A. Section 330(a)(1)(A) authorizes awards of compensation for "services rendered" by an attorney or other professional. When used in this context, the term "service" ordinarily refers to "labor performed for another." *Webster's New International Dictionary of the English Language* 2288 (2d ed. 1934). Accordingly, in construing Section 330(a)'s predecessor provision under the Bankruptcy Act, ch. 541, 30 Stat. 544, this Court concluded that the equivalent phrase "'reasonable compensation for services rendered' necessarily implies loyal and disinterested service in the interest of" a professional's client. *Woods* v. *City Nat'l Bank & Trust Co.*, 312 U.S. 262, 268 (1941); accord *American United Mut. Life Ins. Co.* v. *City of Avon Park*, 311 U.S. 138, 148 (1940). Time spent by a professional preparing and defending its fee application is not naturally characterized as "labor performed for another" or as "disinterested service in the interests of" the professional's client. To the contrary, it is work that the professional does on its own behalf.

B. Petitioners' reading of the statute could also produce anomalous practical results. Petitioners correctly recognize that compensation may be awarded only for the *successful* defense of a fee application. But if fee-defense work is viewed as independently compensable "services rendered," it is not readily apparent why fees for such work would be limited to

cases in which the fee defense succeeds. On petitioners' theory, an unsuccessful defense of a fee application could qualify as a service "necessary to the administration of the case," 11 U.S.C. 330(a)(4)(A)(ii)(II), because even an unsuccessful defense "serves to accurately determine the amount of reasonable compensation owed by the estate," Pet. Br. 25.[12]

C. No such textual or practical difficulties arise if fees for defending a fee application are viewed as a means of ensuring that professionals receive "reasonable compensation" for "services rendered" in the underlying bankruptcy case. When a professional's defense of its fee application is successful, the court will by definition have found that those underlying services satisfy Section 330(a)'s prerequisites to compensation. Treating additional fees for time spent defending the fee application as a component of "reasonable compensation" for those underlying services furthers the anti-dilution purpose that petitioners correctly

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[12] The generally accepted rule is that, for purposes of Section 330(a)(4)(A)(ii), the necessity and likely benefit of particular services should be measured "from the perspective of the time that the services were rendered, rather than based on hindsight after the services ha[ve] been performed." 3 *Collier* ¶ 330.03[1][b][iii], at 330-25 (footnote omitted); see *Smith*, 317 F.3d at 926; *In re Top Grade Sausage, Inc.*, 227 F.3d 123, 132 (3d Cir. 2000); *In re Ames Dep't Stores, Inc.*, 76 F.3d 66, 71 (2d Cir. 1996). But cf. *In re Woerner*, 758 F.3d 693, 703 (5th Cir. 2014) (Prado, J., specially concurring) (criticizing the Fifth Circuit's contrary rule and urging the court to grant rehearing en banc to overrule it), reh'g en banc granted, No. 13-50075, 2014 WL 5786536 (Nov. 5, 2014). If fee-defense work were treated as potentially compensable "services rendered," that approach would suggest that at least some unsuccessful defenses could be compensable, on the theory that the professional's defense of its fee application was reasonable at the time it was undertaken even though it did not ultimately succeed.

emphasize, without adopting an unnaturally broad reading of the term "services" in Section 330(a)(1)(A) as encompassing work that professionals perform on their own behalf. And because a bankruptcy court's partial or complete *rejection* of a fee application reflects a determination that the relevant underlying services are *not* compensable (*i.e.*, that the "reasonable compensation" for those services is zero) or that the compensation originally sought was excessive, that rationale also ensures that fees are not awarded for unsuccessful fee-defense work.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 14-103

IN THE

Supreme Court of the United States

BAKER BOTTS L.L.P. and JORDAN, HYDEN, WOMBLE, CULBRETH & HOLZER, P.C.,

Petitioners,

—v.—

ASARCO LLC,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* PROFESSORS RICHARD AARON, JAGDEEP S. BHANDARI, SUSAN BLOCK-LIEB, ROBERT D'AGOSTINO, GEORGE W. KUNEY, LAWRENCE PONOROFF, AND KEITH SHARFMAN IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES v

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 7

POINT I—UNDER THE PLAIN MEANING OF SECTIONS 327(a) AND 330(a)(1), COMPENSATION CANNOT BE AWARDED TO A TRUSTEE'S ATTORNEY FOR LITIGATION AIMED AT DEFEATING OBJECTIONS TO ITS OWN FEE APPLICATION 7

A. Under Their Plain Meaning, Sections 327(a) and 330(a)(1) Limit Awards for Professional Services in Bankruptcy Cases, Precluding Compensation For Litigating a Fee Application 7

B. Under the Plain Meaning of Section 327(a), A Trustee's Attorney Does Not, By Defending Its Own Fee Application, "Represent or Assist The Trustee In Carrying Out The Trustee's Duties Under This Title [11]" 10

PAGE

C. Section 327(a)'s Plain Text Prohibits A Trustee From Employing An Attorney Who "Hold[s] Or Represent[s] An Interest Adverse To The Estate" 12

D. The Factors In Section 330(a)(3) For Determining the Reasonableness of Compensation Do Not Confer a Right to Compensation..... 14

E. To Be Compensable, An Attorney's Services Must, As Required By Section 330(a), Be Both "Necessary" and "Reasonably Likely To Benefit The Debtor's Estate," But Petitioners' Services Were Neither 16

1. Petitioners' Defense Of Their Fee Application Was Not "Necessary" For The Trustee 16

2. Section 330(a)(4)(A)(ii)(I) Precludes Compensation for an Attorney's Effort to Defeat Objections To Its Fee Application, as such Services Are Unlikely to Benefit the Estate 18

PAGE

POINT II—BEYOND THE PLAIN MEANING OF SECTIONS 327(a) AND 330(a)(1), IT IS EVIDENT THAT CONGRESS DID NOT INTEND SUCH PROVISIONS TO PERMIT COMPENSATION TO A TRUSTEE'S ATTORNEY FOR DEFENDING ITS OWN FEE APPLICATION 21

A. The American Rule, Which Applies in Bankruptcy Cases, Precludes an award of Compensation Under Section 330(a)(1) For Defense of a Fee Application 21

B. The Legislative History of 11 U.S.C. § 330(a) Shows That Congress Did Not Intend To Allow Compensation for Fee Defense 24

C. The Legislative History of Section 330(a)(6) Evinces Congressional Intent to Deny Compensation for Defending A Fee Application 26

1. Legislative History 26

2. A Pre-1994 Split in the Case Law Was Resolved By Congress Against Allowing Compensation for Defending a Fee Application 27

PAGE

3. *Expressio unius est exclusio alterius* 29

D. Section 330(a) Should Be Construed as Not Authorizing Compensation for Defending a Fee Application Because It Would Reduce the Funds Available for Paying Priority and Other Claims, and Could Stand in the Way of Confirming a Plan of Reorganization 30

E. There Was No Pre-Code Practice of Allowing Fees for the Defense of Fee Applications 33

CONCLUSION 36

TABLE OF AUTHORITIES

Cases: PAGE(S)

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) ..... *passim*

Andrus v. Glover Const. Co., 446 U.S. 608 (1980) 30

Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796) 21

Bank Brussels Lambert v. Coan, 176 F.3d 610 (2d Cir. 1999) 13

Bank of America Nat. Trust and Sav. Assn. v. 203 North LaSalle St. Partnership, 526 U.S. 434 (1999) 10, 20

Cohen v. de la Cruz, 523 U.S. 213 (1990) 35

Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343 (1985) 10, 20

Day v. Woodworth, 54 U.S. (13 How.) 363 (1851) 21

Emil v. Hanley, 318 U.S. 515 (1948) 23, 35

Erlenbaugh v. United States, 409 U.S. 239 (1972) 7

F.D. Rich Co., Inc. v. United States ex rel. Industrial Lumber Co., Inc., 417 U.S. 116 (1974) 22

PAGE(S)

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82 U.S. (15 Wall) 450 (1873) 21

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386 U.S. 714 (1967) 22

Goodyear Atomic Corp. v. Miller,
486 U.S. 174 (1988) 28

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908 F.2d 874 (11th Cir. 1990)..... 18

Hall v. Cole,
412 U.S. 1 (1973)..... 22

Hall v. United States,
132 S. Ct. 1882 (2012) 23

Hardt v. Reliance Standard Life Ins. Co.,
560 U.S. 242 (2010) 22

Holland v. Florida,
560 U.S. 631 (2010) 30

In re Acequia,
34 F.3d 800 (9th Cir. 1994) 23

In re AFI Holding, Inc.,
530 F.3d 832 (9th Cir. 2008) 12

In re Alan I.W. Frank Corp.,
71 B.R. 585 (Bankr. E.D.Pa. 1987) 28

In re Amarex,
853 F.2d 1526 (10th Cir. 1988) 32

In re Apex Oil Co.,
960 F.2d 728 (8th Cir. 1992) 24

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In re Ben Franklin Retail Store, Inc.,
227 B.R. 268 (Bankr. N.D.Ill. 1998).... 8, 15

In re Bethlehem Steel Corp., 4
79 F.3d 167 (2nd Cir. 2007) 32

In re Bible Deliverance Evangelistic Church,
39 B.R. 768 (Bankr. E.D.Pa. 1984) 28

In re Burns,
3 Fed. Appx. 689 (10th Cir. 2001) 23

In re Busy Beaver Bldg. Ctrs., Inc.,
19 F.3d 833 (3rd Cir. 1994) 24

In re CF & I Fabricators of Utah, Inc.,
131 B.R. 474 (Bankr. D.Utah 1991) 28

In re Colortex Indus., Inc.,
19 F.3d 1371 (11th Cir. 1994)..... 32

In re Courson,
138 B.R. 928 (Bankr. N.D.Iowa 1992).. 28

In re Dant & Russell, Inc.,
853 F.2d 700 (9th Cir. 1988) 32

In re DN Assoc.,
165 B.R. 344 (Bankr. D.Me. 1994)..... 27

In re Federated Dept. Stores, Inc.,
270 F.3d 994 (6th Cir. 2001) 32

In re Finley, Kumble, Heine, Underberg, Manley, Meyerson and Casey,
160 B.R. 882 (Bankr. S.D.N.Y. 1991)... 32

In re Flight Transp. Corp. Securities Litig.,
874 F.2d 576 (8th Cir. 1989) 31, 32

PAGE(S)

In re Four Star Terminals, Inc.,
42 B.R. 419 (Bankr. D. Alaska 1984)... 28

In re Fox,
725 F.2d 661 (11th Cir. 1984)..... 23

In re Jessee,
77 B.R. 59 (Bankr. W.D.Va. 1987)..... 27

In re Lederman Enterprises, Inc.,
997 F.2d 1321 (10th Cir. 1993) 20

In re Luongo,
259 F.3d 323 (5th Cir. 2001) 10

In re McClanahan,
137 B.R. 73 (Bankr. M.D.Fla. 1992).... 28

In re Nucorp Energy, Inc.,
764 F.2d 655 (9th Cir. 1985) 28

In re O.P.M. Leasing Svcs., Inc.,
23 B.R. 104 (Bankr. S.D.N.Y. 1982).... 32

In re Pro-Snax Distributors, Inc.,
157 F.3d 414 (5th Cir. 1995) 20

In re Reed,
890 F.2d 104 (8th Cir. 1989) 19

In re Roberts,
46 B.R. 815 (Bankr. D.Utah 1985),
aff'd in part and rev'd in part on other grounds, 75 B.R. 402
(D.Utah 1987) 12, 13

In re Schumaker Const., Inc.,
346 F.2d 353 (7th Cir. 1965) 19

PAGE(S)

In re Sheridan,
105 F.3d 1164 (7th Cir. 1997)..... 23

In re Singson,
41 F.3d 316 (7th Cir. 1994) 15

In re St. Rita's Assoc. Private Placement, LLC, 260 B.R. 650
(Bankr. W.D.N.Y. 2001).....22, 23, 25

In re Teraforce Technology Corp.,
347 B.R. 838
(Bankr. N.D.Tex. 2006) 22, 23, 25

In re The Liberal Market, Inc.,
24 B.R. 653 (Bankr. S.D.Ohio 1982).... 28

In re The Vogue,
92 B.R. 717 (Bankr. E.D.Mich. 1988) ..25, 28

In re United Trucking Service, Inc.,
851 F.2d 159 (6th Cir. 1988) 32

In re Ward,
894 F.2d 771 (5th Cir. 1990) 19

In re WHET, Inc.,
750 F.2d 149 (1st Cir. 1984) 13

In re Wildman,
72 B.R. 700 (Bankr. N.D.Ill. 1987) 17, 28

In re Wilson Foods Corp.,
36 B.R. 317 (Bankr. W.D.Okla. 1984) .. 28

In re Wireless Technologies, Inc.,
449 B.R. 228
(Bankr. M.D. Pa. 2011).....*passim*

PAGE(S)

In re World Indus. Ctr., Ltd.,
992 F.2d 1220, 1993 WL 133984
(9th Cir. 1993)..... 19

Iselin v. United States,
270 U.S. 245 (1926)..... 29

Key Tronic Corp. v. United States,
511 U.S. 809 (1994)..... 22

Lamie v. United States Trustee,
540 U.S. 526 (2004).....*passim*

Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,
507 U.S. 163 (1993)..... 30

Matter of Arkansas Fuel Oil Corp.,
234 F.Supp. 31 (D. Del. 1964).....33, 34

Matter of Consol. Bancshares, Inc.,
785 F.2d 1249 (5th Cir. 1986)..... 19

Matter of Perez Hernandez,
73 B.R. 329 (Bankr. D.P.R. 1987)..... 17

Matter of Sapphire Steamship Lines, Inc.,
509 F.2d 1242 (2d Cir. 1975)..... 19

Matter of United Corp.,
184 F. Supp. 502 (D. Del. 1960)..... 34

Matter of United Corp.,
39 S.E.C. 391, 0059 WL 59228 (1959)..34, 35

Maxwell v. KPMG, LLP,
520 F.3d 713 (7th Cir. 2008)..... 19

Merck & Co., Inc. v. Reynolds,
559 U.S. 633 (2010)..... 28

PAGE(S)

Mississippi ex rel. Hood v. AU Optronics Corp.,
134 S.Ct. 736 (2013) 23

Mosser v. Darrow,
341 U.S. 267 (1951) 13, 14

O'Melveny & Myers v. FDIC,
512 U.S. 79 (1994) 30

Oelrichs v. Spain,
82 U.S. (15 Wall) 211 (1872) 21

Randolph & Randolph v. Scruggs,
190 U.S. 533 (1903) 18, 19, 20

Rome v. Braunstein,
19 F.3d 54 (1st Cir. 1994) 13

Schwab v. Reilly,
560 U.S. 770 (2010) 16

Stewart v. Sonneborn,
98 U.S. (8 Otto) 187 (1878) 21

Toibb v. Radloff,
501 U.S. 157 (1991) 20

Travelers Cas. and Sec. Co. of America v. Pacific Gas and Elec. Co.,
549 U.S. 443 (2007) 22, 23

Trustees of Amalgamated Ins. Fund v. McFarlin's, Inc.,
789 F.2d 98 (2d Cir. 1986) 32

United States v. Alvarez-Hernandez,
478 F.3d 1060 (9th Cir. 2007) 29

United States v. Male Juvenile,
280 F.3d 1008 (9th Cir. 2002) 28-29

PAGE(S)

Whitman v. American Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001) 29

Statutes:

11 U.S.C. § 101(5)(A) 12

11 U.S.C. § 102(3) 12

11 U.S.C. § 104(a)(1) 24

11 U.S.C. § 327 ..... *passim*

11 U.S.C. § 327(a) ..... *passim*

11 U.S.C. § 330 ..... *passim*

11 U.S.C. § 330(a)(1) ..... *passim*

11 U.S.C. § 330(a)(1)(A) 11

11 U.S.C. § 330(a)(3) 14, 15

11 U.S.C. § 330(a)(3)(C) 14

11 U.S.C. § 330(a)(3)(F) 24

11 U.S.C. § 330(a)(4) 9

11 U.S.C. § 330(a)(6) ..... *passim*

11 U.S.C. § 330(a)(4)(A)(ii)(I) ..... *passim*

11 U.S.C. § 503(b)(2) 30

11 U.S.C. § 507 30

11 U.S.C. § 507(a)(2) 30

11 U.S.C. § 704 ..... 3, 10

11 U.S.C. § 704(a)(5) 10

PAGE(S)

11 U.S.C. § 943(b)(5) 31

11 U.S.C. § 1103 15

11 U.S.C. § 1106 10

11 U.S.C. § 1106(a) 3

11 U.S.C. § 1107 2

11 U.S.C. § 1129(a)(9)(A) 31

Legislative History:

H.R. Rep. 95-595 at 330 (1977)..... 24

140 Cong. Rec. S. 4741 (daily ed. April 21, 1994) 26

140 Cong. Rec. H. 10,769 (daily ed. October 4, 1994)..... 28

Hearing Before the Subcommittee on Courts and Administrative Practice of the Senate Committee on the Judiciary, 102-1099 (March 24, 1992)..... 27

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G. Bogert, The Law Of Trusts and Trustees §543 13

Merriam-Webster's Dictionary http://www.merriam-webster.com/dictionary/necessary..... 16

PAGE

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INTEREST OF *AMICI CURIAE*[1]

The *Amici Curiae* are law professors who have devoted their careers to the study and teaching of bankruptcy law.[2] They respectfully submit this *pro bono* brief in support of respondent, and urge the Court to rule that section 330(a)(1) of the Bankruptcy Code (the "Code") does not authorize a bankruptcy court to award compensation to an attorney for a trustee or debtor in possession (herein, a "trustee")[3] for the time devoted to litigating its fee application so as to defeat objections to the application.

The *amici* are keenly interested in this appeal for two reasons. *First,* the question posed by this appeal transcends the allowability of fees for a

---

[1] Pursuant to Rule 37 of the Rules of this Court, the *amici* file this brief with the written consent of both parties, which are on file with the Clerk. No person or entity including the *amici* or their counsel made a monetary contribution for the preparation or submission of this brief.

[2] The *amici* are the following law professors who teach at the law schools indicated next to their names: Richard Aaron, University of Utah, S.J. Quinney College of Law; Jagdeep S. Bhandari, Florida Coastal College of Law; Susan Block-Lieb, Fordham University School of Law; Robert D'Agostino, John Marshall School of Law; George W. Kuney, University of Tennessee College of Law; Lawrence Ponoroff, University of Arizona James E. Rogers College of Law; and Keith Sharfman, St. John's University School of Law.

[3] By virtue of section 1107 of the Bankruptcy Code, a debtor in possession in a chapter 11 case has substantially all of the rights and powers of a bankruptcy trustee. In this brief, the term "trustee" includes a debtor in possession as well as a trustee serving in a case under the Code.

trustee's attorney because section 330(a)(1)[4] governs compensation awards for all professional persons who serve trustees. *Second*, if such fees were allowed, they would constitute administrative priority claims in bankruptcy cases. As such, they would adversely affect the recovery of other creditors, and impede confirmation of plans of reorganization under chapter 9 and chapter 11 of the Code.

The *amici* represent no institution, group, or association. Their sole purpose in filing this brief is to offer what assistance they can to this Court as it considers and decides this important bankruptcy law issue.

SUMMARY OF ARGUMENT

The *amici* urge the Court to affirm the decision of the Fifth Circuit Court of Appeals disallowing the award made under section 330(a)(1) by the bankruptcy court for the time spent by petitioners in the defense of their fee applications. Petitioners were employed as the attorneys for the chapter 11 debtor in possession, and, pursuant to section 1107, served in the capacity of a bankruptcy trustee. The *amici* contend that the Circuit Court correctly held that the Code does not provide for a trustee's attorney to recover fees for defending its fee application, which is solely for the attorney's own benefit, does not serve the trustee, and cannot benefit the debtor estate.

---

[4] All references in this brief to numbered sections are to the Bankruptcy Code, as now in effect (i.e. title 11 of the United States Code), unless the context indicates otherwise.

Most fundamentally, section 330(a)(1) only allows compensation for "necessary services" rendered by "a professional person employed under section 327" by the trustee, and it plainly does not permit a trustee to employ an attorney to pursue litigation to defeat objections to its own fee application. This is because section 327(a) only permits a trustee to employ an attorney "to represent or assist the trustee in carrying out the trustee's duties under this title [i.e., title 11]." By defending its fee application, the trustee's attorney does not "represent or assist the trustee;" it is only representing or assisting itself. Nor does such defense involve "carrying out the trustee's duties." Those duties, which are enumerated in sections 704 and 1106(a) of the Code, nowhere extend to the defense of a trustee's attorney's disputed fee application. Because section 327(a) does not permit the trustee to retain an attorney to defend the attorney's own fee application, compensation cannot be allowed under section 330(a)(1) for such defense.

Secondly, section 330(a)(4)(A)(ii)(I) expressly precludes allowing compensation for "services that were not reasonably likely to benefit the debtor estate." Litigating on one's own behalf to defeat an objection to one's own claim for a fee from the estate is not a service that could benefit the estate, thus precluding compensation under section 330(a)(1) for the time spent in litigating objections to one's own fee application.

Thirdly, section 327(a) only authorizes a trustee to employ persons who "do not hold or represent an interest adverse to the estate." Yet the prosecution of a fee application against the estate is necessarily adverse to the estate, which must pay the

fees that are awarded; it is essentially a suit by the attorney on its own claim against the estate. Because section 327(a) bars a trustee from employing an attorney to prosecute its own adverse claim against the estate, section 330(a)(1) forbids an award to the attorney for litigating its fee claim against the estate.

Although the plain meaning of sections 327(a) and 330(a)(1) is sufficient to decide this appeal in favor of respondent, if the Court were to look beyond their plain meaning, the *amici* offer several reasons for concluding that Congress did not intend those provisions to allow compensation for litigating a fee application against the estate.

First, section 330(a) was enacted in 1978, barely three years after this Court's ruling in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975), which re-affirmed the long standing American Rule that litigants bear their own litigation costs, absent an agreement to the contrary or bad faith or vexatious litigation, which are exceptions not involved in this appeal.[5] Congress must be deemed to have been aware of this Court's ruling in *Alyeska* and the ancient American Rule when it enacted section 330(a). It should not be presumed to have rejected the American Rule for bankruptcy cases, absent express statutory language or a clear indication that it intended to do so. Congress thus presum-

[5] There was no finding below, and petitioners do not assert, that the objections to their fee applications involved bad faith or vexatious litigation, or that the bankruptcy court's orders approving their retention authorized compensation for defending their fee applications if objections were filed.

ably intended that the American Rule, under which an attorney does not recover its cost for suing a client for a fee, would apply to the collection of fees in bankruptcy cases as well.

Second, the Congressional history of section 330(a) shows that a primary purpose of that provision was to enable attorneys in bankruptcy cases to be compensated on essentially the same basis as attorneys in non-bankruptcy cases. Congress thus presumably intended that, just like attorneys in non-bankruptcy cases, attorneys for trustees would not be compensated for the time devoted to collect their fees.

Third, the allowance of compensation for defending a fee application could, as an administrative priority expense, adversely affect recoveries by other priority claimants, as well as the entire general creditor body. It could also make it more difficult to achieve, and in some cases prevent, confirmation of a plan of reorganization under chapter 9 or chapter 11 of the Code, because a requirement for confirming such a plan is that awards for compensation must be paid in cash in full. Moreover, adding fee defense costs to otherwise large fees would run counter to Congress' purpose in amending section 330 in 1994 to rein in large bankruptcy fees. Further, because a basic goal of the bankruptcy law is to maximize the estate for the benefit of all creditors, section 330(a)(1) should be read narrowly so as not to treat services as "necessary" for which it does not expressly provide.

Fourth, the addition of section 330(a)(6) to the Code in 1994 provides another reason why the defense of a fee application is not compensable,

namely the venerable canon of construction *expressio unius est exclusio alterius*. By providing in section 330(a)(6) for compensation for preparing a fee application, but not for its defense, Congress excluded compensation for litigating its defense. During the two-year legislative process culminating in the 1994 amendments, Congress addressed the compensability of professional services. In its wisdom, Congress determined not to enact a provision allowing compensation for litigating objections to the application, although, as the *amici* note herein, a request had been made to a congressional committee early in the legislative process to amend section 330 to provide for both.

In sum, sections 327(a) and 330(a)(1) must be read according to their plain meaning or, if the Court looks beyond their plain meaning, they should be construed as not allowing an award of compensation to a trustee's attorney for the time devoted to defending its disputed fee application.

ARGUMENT

POINT I

UNDER THE PLAIN MEANING OF SECTIONS 327(a) AND 330(a)(1), COMPENSATION CANNOT BE AWARDED TO A TRUSTEE'S ATTORNEY FOR LITIGATION AIMED AT DEFEATING OBJECTIONS TO ITS OWN FEE APPLICATION

A. Under Their Plain Meaning, Sections 327(a) and 330(a)(1) Limit Awards for Professional Services in Bankruptcy Cases, Precluding Compensation For Litigating a Fee Application

Section 330(a)(1) is the provision that governs the entitlement of a professional person to an award of compensation from the estate for services to the trustee. Section 330(a)(1), which refers to section 327, incorporates section 327(a)'s limitations on employment of professional persons by a trustee. The operative language of section 330(a)(1) is: " the court may award to a professional person employed under section 327 " Those provisions must be read together in order to determine whether a particular service may be compensated. *See Lamie v. United States Trustee*, 540 U.S. 526, 537 (2004) (herein "*Lamie*") (sections 327 and 330(a) should be "taken together"); *Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972) ("individual sections of a single statute should be construed together").

A professional person employed by a trustee may be compensated under section 330(a)(1) *only* for a service authorized under section 327(a). As

stated by this Court in *Lamie*, 540 U.S. at 538, "[a]dhering to conventional doctrines of statutory interpretation, we hold that § 330(a)(1) does not authorize compensation awards to debtor's attorneys from estate funds, unless they are employed as authorized by § 327." *See, e.g., In re Wireless Technologies, Inc.*, 449 B.R. 228, 236 (Bankr. M.D. Pa. 2011) (herein "*Wireless*") (denied compensation to an attorney employed under section 327(a) for preparing another attorney's fee application, as "beyond the scope of the appointment"); *In re Ben Franklin Retail Store, Inc.*, 227 B.R. 268, 271 (Bankr. N.D. Ill. 1998) (herein "*Ben Franklin*") (denying fees for contesting the election of a trustee, because such services were not necessary to carry out the trustee's statutory duties).

Section 327(a) imposes two threshold limitations on professional services for which compensation may be awarded under section 330(a)(1). *First*, section 327(a) authorizes a trustee to employ an attorney only if the attorney does not "hold or represent an interest adverse to the estate." Under this limitation, an award cannot be made for services designed to defeat objections to a fee application of a trustee's attorney. This is because such services assert an adverse claim against the estate, which, if sustained, would reduce the funds of the estate, contrary to the duty of a trustee to maximize the assets of the estate. *Second*, section 327(a) carefully delineates the authority of a trustee to employ an attorney, and permits retention only "to represent or assist the trustee in carrying out the trustee's duties under this title [11]." This limitation precludes an award for services designed to defeat objections to a trustee's attorney's fee application. This is because a trustee

obviously does not have a statutory duty to try to defeat objections to its own attorney's fee application seeking payment from the estate. Despite the crucial significance of section 327(a) to the question now before this Court, the petitioners mention section 327(a) only once in their brief, which does not set forth any discussion of that critically important provision. *See* Pet. Op. Br. at 6.

In addition, even if a trustee's attorney were able to hurdle the bar imposed by section 327(a), petitioners have also failed to satisfy section 330(a)(1)'s express requirement that services must be "necessary" in order to be compensable. Because the effort by a trustee's attorney to defeat objections to its fee application can only deplete the estate, such services were not "necessary" for the trustee to receive. Moreover, such an award to petitioners for such services is prohibited by section 330(a)(4), which precludes an allowance of compensation for services that "were not reasonably likely to benefit the debtor's estate." *See* Point I.E.2 *infra*.

Congress wrote these provisions in clear and unambiguous words. To read these provisions as allowing fees for the trustee's attorney's litigation effort to get paid would essentially rewrite their plain text.

B. Under the Plain Meaning of Section 327(a), a Trustee's Attorney Does Not, By Defending Its Own Fee Application, "Represent or Assist the Trustee In Carrying Out the Trustee's Duties Under This Title [11]"

Section 327(a) permits the trustee to employ a professional only to "represent or assist" the trustee in carrying out its statutory duties under the Code. The trustee's duties are listed in sections 704 and 1106 of the Code. Section 704(a)(5) calls upon a trustee to "object to the allowance of any claim that is improper." The Code, however, does not impose any duty on the trustee to uphold a contested fee application because the estate's funds would be diminished by a successful effort to defeat objections to the application, and a trustee thus cannot employ an attorney to do so. In attempting to defeat objections to its fee application, a trustee's attorney does not "represent" or "assist" the trustee "in carrying out the trustee's duties under this title." In doing so, the attorney only represents itself to achieve a goal that is contrary to the duty of a trustee to maximize the estate. *See Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 352 (1985) (herein "*Weintraub*") ("The trustee has the duty to maximize the value of the estate."); *Bank of America Nat. Trust and Sav. Assn. v. 203 North LaSalle St. Partnership*, 526 U.S. 434, 453 (1999) (herein "*203 North LaSalle*") (a "recognized polic[y] underlying Chapter 11 [is] maximizing property available to satisfy creditors."); *In re Luongo*, 259 F.3d 323, 340 n.3 (5th Cir. 2001) ("The trustee's duty is to maximize the estate for the purposes of distribution to the creditors."). *See*

also Wireless, 449 B.R. at 235 (denied compensation for services that would not benefit the estate, and "would only be of value to [the debtor's principal] himself."). Moreover, as the United States concedes in its *amicus* brief, the work of a trustee's attorney, even in successfully defending its fee application, does not itself constitute "'services rendered' for which the attorney should receive 'reasonable compensation' under section 330(a)(1)(A)." *See* United States' *amicus* brief at 31-32.

If petitioners had employed an attorney to handle the defense of their fee applications, their attorney would have been representing the petitioners, not the trustee. Had petitioners employed an attorney for that purpose, court approval of such employment under section 327(a) would not have been required, and neither the petitioners nor their retained attorney would have had a right to recover from the estate for the retained attorney's services. Petitioners' services in defending their own fee applications are likewise not compensable from the estate, and the time devoted by them to defending their applications did not become compensable because they defended their applications *pro se*.

The briefs filed by petitioners and their *amici* seeking a reversal fail to recognize that sections 327(a) and 330(a)(1) should be "taken together," as stated by *Lamie*, 540 U.S. at 537. Those briefs ignore the threshold limitations of section 327(a) on attorney compensation under section 330(a)(1), merely offering one perfunctory citation of section 327(a) as requiring court approval for retention of an attorney, without any mention of its preclusive

effect on the allowability of defense fees. *See* Pet. Op. Br. at 6.

The words of section 327(a) simply do not include authorization for any services other than those specified in that provision, particularly in the absence of the word "including" following the services it specifically sets forth. *See* section 102(3) (stating "'includes' and 'including' are not limiting" in the Code). The plain text of section 327(a) should not be expanded by adding a provision to authorize legal services that could diminish the size of the estate.

C. Section 327(a)'s Plain Text Prohibits a Trustee From Employing an Attorney Who "Hold[s] or Represent[s] an Interest Adverse to the Estate"

In common parlance, to hold "an interest adverse to the estate" means to possess a position against the estate. In the bankruptcy context, "an interest adverse to the estate" is something that would deplete estate assets. Seeking to defeat an objection to a fee application is against the interests of the estate because it serves to deplete estate assets, and thus asserts "an interest adverse to the estate," as furthering the attorney's claim against the estate. Section 101(5)(A) defines a "claim" as a "right to payment." By litigating to defeat an objection to its own fee claim, the attorney asserts its own economic interests, not the interest of the estate. Therefore, defense fees cannot be compensated.

The Ninth Circuit Court of Appeals in *In re AFI Holding, Inc.*, 530 F.3d 832, 845 (9th Cir. 2008), stated that *In re Roberts,* 46 B.R. 815, 826-27

(Bankr. D.Utah 1985), *aff'd in part and rev'd in part on other grounds,* 75 B.R. 402 (D.Utah 1987), set forth "[a] generally accepted definition of 'adverse interest.'" Under that definition, something that would deplete estate assets constitutes an "interest adverse to the estate." As stated in *In re Roberts*, to "hold an interest adverse to the estate" means:

> (1) to possess or assert any economic interest that would tend to lessen the value of the bankruptcy estate or that would create either an actual or potential dispute in which the estate is a rival claimant; or (2) to possess a predisposition under circumstances that render such a bias against the estate.

46 B.R. at 826-27. *See also Rome v. Braunstein*, 19 F.3d 54, 58 n.1 (1st Cir. 1994) (citing *In re Roberts* as providing a "pragmatic" description of "adverse interest.").

As the estate's representative, the trustee "owes a fiduciary duty to debtor and creditors alike to act fairly and protect their interests." *In re WHET, Inc.*, 750 F.2d 149, 149 (1st Cir. 1984). A trustee's duty of loyalty also extends to the trustee's professionals. *See Mosser v. Darrow,* 341 U.S. 267, 271-72 (1951); *see also Bank Brussels Lambert v. Coan,* 176 F.3d 610, 621 (2d Cir. 1999). Pursuant to its fiduciary status, "[t]he trustee must exclude all self-interest, as well as the interest of a third party, in his administration of the trust solely for the benefit of the beneficiary." G. Bogert, *The Law Of Trusts and Trustees* §543. A trustee's attorney, as an employee of the trustee, must comply with the preclusion of self interest

imposed by the law of trusts, as held by *Mosser v. Darrow*, 341 U.S. at 271-272. Litigation of a trustee's disputed fee application by the trustee's attorney is the assertion of a self-interested "interest adverse to the estate," within the meaning of section 327(a), for which compensation thus may not be awarded under section 330(a)(1). Indeed, the United States Trustee, in its brief filed in the district court in this case, recognized that these principles are inherent in section 330, stating: "[t]he better-reasoned view is that such an award [for fees for prosecuting a fee application] is generally precluded by the plain text of the Bankruptcy Code, which (subject to exceptions not relevant here) prohibits professionals from receiving compensation from the estate for work that is adverse to the interests of the estate." *See* United States Trustee's district court brief at 22.

D. The Factors in Section 330(a)(3) For Determining the Reasonableness of Compensation Do Not Confer a Right to Compensation

Petitioners, and their *amici*, mistakenly conflate the factors for determining the *reasonableness* of compensation with the threshold question of *entitlement* to compensation in the first place. For example, petitioners assert that successfully defending a fee application is both "necessary to the administration of" and "beneficial toward the completion of" a bankruptcy "case," and is thus compensable. *See* Pet. Op. Br. at 25, 33, and 53. However, being "necessary to the administration" and "beneficial toward completion of" a bankruptcy "case" are simply two of the statutory factors in section 330(a)(3)(C) for "determining the amount

of reasonable compensation to be awarded to [a] professional person" under section 330(a)(1). The section 330(a)(3) factors do *not* create a right to compensation. Rather, applying section 330(a)(3)'s factors presupposes that the professional has been retained under section 327(a) and thus qualifies for compensation to begin with; those factors merely determine the reasonable *amount* of compensation. In the absence of retention under section 327(a) to render the service in question, the factors for determining reasonableness of compensation simply never come into play. That result is clear from section 330(a)(1), which specifically permits compensation only to professional persons "employed under sections 327 or 1103." Case law also recognizes that result. *See Lamie*, 540 U.S. at 537 (compensation not authorized under section 330(a)(1) in absence of retention under section 327(a)); *In re Singson*, 41 F.3d 316, 320 (7th Cir. 1994) (payment disallowed for work done outside of scope of retention, and also denying request for retroactive expansion of scope of retention); *Wireless*, 449 B.R. at 236 (denied compensation for work "beyond the scope" of employment); *Ben Franklin*, 227 B.R. at 271 (same).

Accordingly, petitioners' argument that rendering services allegedly necessary to the administration of the case and beneficial towards its completion entitles one to compensation under section 330(a)(1) utterly misses the pre-requisite need for retention under section 327(a) to render the services in question. As shown above, petitioners were not, and as a matter of law could not have been, retained under section 327(a) for defending their own fee applications. Nor is there anything harsh or unfair about denying compensa-

tion even if petitioners' services were, *arguendo*, necessary to administration of, or beneficial to completing, the case. This is because *every* creditor's attorney who prosecutes a claim contributes to administering the estate by helping to liquidate a claim, and *all* estates benefit from having the claims against them liquidated. Yet such attorneys are not paid for those services.

E. To Be Compensable, An Attorney's Services Must, As Required By Section 330(a), Be Both "Necessary" and "Reasonably Likely To Benefit The Debtor's Estate," But Petitioners' Services Were Neither

1. Petitioners' Defense Of Their Fee Application Was Not "Necessary" For The Trustee

This Court has long relied on dictionaries for the plain meaning of words not defined by statute. *See Schwab v. Reilly*, 560 U.S. 770, 783 (2010) (the Court "look[s] to dictionaries to determine the meaning of words the Code does not define"). The word "necessary" is defined to mean "required" in Webster's Third New International Dictionary 2075 (3d ed. 1961), and as "[r]equired to be done, achieved, or present; needed; essential" in *Oxford English Dictionary*, available at http://www.oxforddictionaries.com/us/definition/american_english/necessary. *See also, Merriam-Webster's Dictionary*, available at http://www.merriam-webster.com/dictionary/necessary (defining "necessary" as "so important that you must do it or have it," which is to say it is "absolutely needed.").

What is "necessary" (that is "required") under section 330(a)(1) is best understood in light of the services that section 327(a) deems to be needed by a trustee, *i.e.* only those by which the professional person "represents or assists the trustee in carrying out the trustee's duties under this title." *See Lamie*, 540 U.S. at 537 (sections 327 and 330 must be read together). In view of section 327(a)'s limitations on the services for which a trustee may employ an attorney, it is clear that services are not necessary if they do not assist the trustee in carrying out its statutory duties. The services for defending one's own fee application are not needed by the trustee to carry out any of its statutory duties, but are needed only by its attorney. Consequently, an attorney's services aimed at defeating an objection to its own fee application are not "necessary" within section 330(a)(1)'s plain meaning.

Further, when determining whether a service is "necessary," the courts look to whether the services were needed to be performed in order to properly represent the client. *See In re Wildman*, 72 B.R. 700, 731 (Bankr. N.D.Ill. 1987) ("Whether an expense is necessary is conditional on whether the item for which the expense was incurred was reasonably needed to accomplish proper representation of the client, here the Trustee."); *Matter of Perez Hernandez*, 73 B.R. 329, 331 (Bankr. D.P.R. 1987). In the instant case, there is no connection between properly representing the trustee and petitioners' defense of their own fee applications.

Accordingly, petitioners may not be compensated for defending their fee application.

2. Section 330(a)(4)(A)(ii)(I) Precludes Compensation for an Attorney's Effort to Defeat Objections to its Fee Application, as such Services Are Unlikely to Benefit the Estate

Section 330(a)(4)(A)(ii)(I) precludes making an award for services not "reasonably likely to benefit the debtor's estate." *See, e.g., Grant v. George Schumann Tire & Battery Co.*, 908 F.2d 874, 883 (11th Cir. 1990). This notion has deep roots in this Court's jurisprudence.

Long ago, in *Randolph & Randolph v. Scruggs*, 190 U.S. 533 (1903) (per Holmes, J.) (herein, "*Randolph*"), this Court established the principle that in a bankruptcy case compensation for legal services is not allowable on an administrative priority basis unless the attorney's services were "beneficial to the estate." *Id.* at 539.

In *Randolph*, an assignment for the benefit of creditors made by a debtor pursuant to state law was superseded by a subsequent involuntary bankruptcy filing under the Bankruptcy Act of 1898. A pre-bankruptcy assignment contract between the debtor-assignor and the assignee provided for the payment of fees of the assignee's attorney. The assignee's attorneys filed a claim against the bankruptcy estate for various services, including the assertion of litigation in the bankruptcy case seeking to prevent an adjudication of the debtor as a bankrupt, which, if successful, would have required the bankruptcy case to be dismissed under a provision of the then applicable Bankruptcy Act. The Court denied the assignee's claim for compensation for those services, stating:

> We are not prepared to go further than to allow compensation for services which were beneficial to the estate [N]o ground appears for allowing the item for services in resisting an adjudication of bankruptcy.

190 U.S. at 539.

Throughout the pre-Code years, the courts applied *Randolph*'s "benefit to the estate" principle. *In re Schumaker Const., Inc.*, 346 F.2d 353, 355 (7th Cir. 1965); *Matter of Sapphire Steamship Lines, Inc.*, 509 F.2d 1242, 1245 (2d Cir. 1975). Thereafter, *Randolph*'s principle was carried into the Code when it was enacted in 1978, and its principle was subsequently reconfirmed and emphasized by the 1994 amendments adding section 330(a)(4)(A)(ii)(I) to the Code, by which Congress specifically precluded making an award for services that were not "reasonably likely to benefit the debtor's estate."

As recognized by the courts, Congress' enactment of that 1994 amendment made explicit *Randolph*'s fundamental principle precluding an award for services that could not benefit the estate. *See, e.g.*, *Maxwell v. KPMG, LLP*, 520 F.3d 713, 718 (7th Cir. 2008); *In re World Indus. Ctr., Ltd.*, 992 F.2d 1220, at *1, 1993 WL 133984 (9th Cir. 1993); *In re Ward*, 894 F.2d 771, 777 (5th Cir. 1990); *In re Reed*, 890 F.2d 104, 105 (8th Cir. 1989); *Matter of Consol. Bancshares, Inc.*, 785 F.2d 1249, 1253 (5th Cir. 1986) ("[A] creditor's attorney must ordinarily look to its own client for payment, unless the creditor's attorney *conferred a significant and demonstrable benefit* to the debtor's estate and the creditors.") (emphasis

in original) (internal citation omitted); *In re Lederman Enterprises, Inc.*, 997 F.2d 1321, 1323 (10th Cir. 1993) ("An element of whether the services were 'necessary' is whether they benefitted the bankruptcy estate."); *In re Pro-Snax Distributors, Inc.*, 157 F.3d 414, 426 (5th Cir. 1995) (denied an allowance for "case administration" for failing to demonstrate "an identifiable, tangible, and material benefit to the estate").

Where a trustee's attorney acts contrary to the trustee's interest and its duty to maximize estate assets, such action clearly is not "likely to benefit the estate." *Toibb v. Radloff*, 501 U.S. 157, 163 (1991) (stating "that Chapter 11 also embodies the general Code policy of maximizing the value of the bankruptcy estate"); *Weintraub*, 471 U.S. at 352 (the trustee has the "duty to maximize the value of the estate"); *203 North LaSalle*, 526 U.S. at 453 (one of the "recognized policies underlying chapter 11" is "maximizing property available to satisfy creditors"). "Benefit" and "necessity" are sometimes mistakenly conflated. *See In re Lederman Enterprises, Inc.*, 997 F.2d at 1323 ("An element of whether the services were 'necessary' is whether they benefited the bankruptcy estate.") See Point I.D *supra* for an analysis of the separateness of "necessity" and "benefit." But, even assuming *arguendo* that "benefit" and "necessity" are separate concepts, it is clear that, contrary to petitioners' contention, services that diminish the estate do not "benefit" it, and hence are not compensable.

Based on the holding in *Randolph*, the courts' application of the "benefit to the estate" doctrine in later decisions, and its codification in section 330(a)(4)(A)(ii)(I), fees for the efforts of a trustee's

attorney to defeat objections to its fee application must be denied for lack of a reasonable likelihood of benefitting the estate.

The *amici* urge that the plain meaning of sections 327(a) and 330(a)(1) require the Court to deny compensation for a trustee's attorney's defense of its own fee application.

POINT II

BEYOND THE PLAIN MEANING OF SECTIONS 327(a) AND 330(a)(1), IT IS EVIDENT THAT CONGRESS DID NOT INTEND SUCH PROVISIONS TO PERMIT COMPENSATION TO A TRUSTEE'S ATTORNEY FOR DEFENDING ITS OWN FEE APPLICATION

A. The American Rule, Which Applies in Bankruptcy Cases, Precludes an Award of Compensation Under Section 330(a)(1) For Defense of a Fee Application

For nearly two centuries, this Court has upheld the American Rule, which states that litigants bear their own litigation costs. *Stewart v. Sonneborn*, 98 U.S. (8 Otto) 187, 197 (1878); *Flanders v. Tweed*, 82 U.S. (15 Wall) 450, 452-53 (1873); *Oelrichs v. Spain*, 82 U.S. (15 Wall) 211, 230-31 (1872); *Day v. Woodworth*, 54 U.S. (13 How.) 363, 372-73 (1851); *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796).

Section 330 was enacted scarcely three years after this Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240

(1975) (herein "*Alyeska*"), which re-affirmed the two century-old American Rule: "In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." *Id.* at 247. *See also Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252-53 (2010) (providing that the American Rule is the "'basic point of reference' when considering the award of attorney's fees"). In utilizing the word "ordinarily," the Court left room for the five well-established exceptions to the American Rule, none of which are claimed by petitioners to apply in this case. *See Travelers Cas. and Sec. Co. of America v. Pacific Gas and Elec. Co.*, 549 U.S. 443, 448-49 (2007) (herein "*Travelers Casualty*") (allocation by contract); *Key Tronic Corp. v. United States*, 511 U.S. 809, 814-15 (1994) (explicit statutory authorization); *F.D. Rich Co., Inc. v. United States ex rel. Industrial Lumber Co., Inc.*, 417 U.S. 116, 129 (1974) (acting in "bad faith, vexatiously, wantonly, or for oppressive reasons"); *Hall v. Cole*, 412 U.S. 1, 5 (1973) ("common fund" exception); *Fleischmann Distilling Corp. v. Mayer Brewing Co.*, 386 U.S. 714, 718 (1967) ("willful disobedience of a court order"). *See also In re St. Rita's Assoc. Private Placement, LLC*, 260 B.R. 650, 652 (Bankr. W.D.N.Y. 2001) (herein "*St. Rita's*") (left the door open to allow defense fees "where sanctions are appropriate" for the filing of inappropriate objections); *In re Teraforce Technology Corp.*, 347 B.R. 838, 866-67 (Bankr. N.D. Tex. 2006) (herein "*Teraforce*") (same).

Because Congress does not write on a clean slate when it legislates, it is deemed to have written section 330(a) with an eye towards *Alyeska* and the American Rule. *See Emil v. Hanley*, 318

U.S. 515, 521 (1948) (when Congress wrote a new bankruptcy act to replace the earlier one, "it was not writing on a clean slate."); *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S.Ct. 736, 742 (2013) ("[W]e presume that 'Congress is aware of existing law when it passes legislation.'") citing (*Hall v. United States*, 132 S. Ct. 1882, 1889 (2012)). It is thus presumed that Congress intended to carry the American Rule into section 330(a)(1), and that the American Rule would illuminate the meaning of that provision.

Extensive case law supports the conclusion that the American Rule applies in bankruptcy cases, just as it does in non-bankruptcy cases. This Court, as well as numerous courts of appeals, has concluded that the American Rule applies in bankruptcy proceedings. *See Travelers Casualty*, 549 U.S. at 448 (applying the American Rule in a bankruptcy case, and applying its contractual exception not applicable to the present case); *In re Burns*, 3 Fed. Appx. 689, 690 (10th Cir. 2001) ("The 'American Rule,' applies in federal litigation, including bankruptcy proceedings "); *In re Sheridan*, 105 F.3d 1164, 1166 (7th Cir. 1997); *In re Acequia*, 34 F.3d 800, 819 (9th Cir. 1994); *In re Fox*, 725 F.2d 661, 662 (11th Cir. 1984); *St. Rita's*, 260 B.R. at 652; *Teraforce*, 347 B.R. at 866-67.

In their main brief, petitioners, disregarding the well established precedent recognizing the applicability of the American Rule to bankruptcy cases, erroneously relied on *Aleyska*'s note 33 as supporting their contention that "reasonable compensation" under section 330(a)(1) must include fee defense fees. That note 33, however, provides no

such support for them. Petitioner's brief asserted that this Court, in *Alyeska*'s note 33, cited 11 U.S.C. § 104(a)(1) [designated as section 64(a)(1) by the Bankruptcy Act of 1898] "as an example of an explicit statutory fee allowance that overcame the American Rule." Pet. Op. Br. 40. However, section 64(a)(1) of the former Act did not contain any provision that mentioned compensation for a trustee's attorney for defending its fee application. In any event, former section 64(a) has been superseded by section 330(a).

B. The Legislative History of 11 U.S.C. § 330(a) Shows That Congress Did Not Intend To Allow Compensation for Fee Defense

The legislative history of section 330(a), which was first enacted in 1978, indicates that a prime purpose was to increase the compensation of attorneys employed by trustees, by placing them in parity with that of attorneys in non-bankruptcy cases. *See In re Busy Beaver Bldg. Ctrs., Inc.*, 19 F.3d 833, 848 (3rd Cir. 1994); *In re Apex Oil Co.*, 960 F.2d 728, 733 (8th Cir. 1992); H.R. Rep. 95-595 at 330 (1977).

In 1994, Congress added section 330(a)(3)(F) to the Code, making explicit that courts must, in determining what constitutes a reasonable amount of compensation, consider the compensation earned by attorneys in non-bankruptcy cases. However, a primary concern of Congress in 1994 was to deal with the exorbitant fees allowed by the bankruptcy courts. *See* Point II.C.1 *infra*. Thus, the comparability provision should be narrowly read as *not* allowing fees for litigation of a

fee application by a trustee's attorney, just as attorneys in non-bankruptcy cases do not recover the cost for suing a client for a fee, absent the client's agreement to pay the cost of collection or vexatious or bad faith litigation.

As aptly stated in *St. Rita's* in denying defense fees to a chapter 11 debtor's attorney:

> Outside the field of bankruptcy, when clients refuse to pay a disputed bill, attorneys must choose either to 'write-off' the liability or to commence litigation for collection. In that litigation, the 'American rule' applies. Each side generally assumes the cost of its own legal counsel. Because skilled practitioners outside bankruptcy would customarily receive no compensation for the additional time spent on litigating a fee dispute, no further compensation is payable to [the chapter 11 debtor's attorney] in the present instance.

260 B.R. at 652. *See also Wireless*, 449 B.R. at 237 (stating that in the market, "attorneys generally do not receive compensation for litigating the collection of their fees"); *see also In re The Vogue*, 92 B.R. 717, 724 (Bankr. E.D.Mich. 1988) ("[B]y requesting compensation for the time necessary to prepare its bill and to litigate it, the applicant is seeking not to be treated as all other attorneys in non-bankruptcy practice, but to be paid something in excess thereof."); *Teraforce*, 347 B.R. at 866-67 (denied defense fees to attorney for a creditors committee, adopting the American Rule's denial of fees in non-bankruptcy cases).

Congress clearly did not intend section 330(a) to

provide higher compensation for bankruptcy attorneys than the "customary compensation" received by attorneys in non-bankruptcy cases, which does not include the costs of collection.

C. The Legislative History of Section 330(a)(6) Evinces Congressional Intent To Deny Compensation for Defending a Fee Application

While the foregoing analysis would logically preclude an award of compensation for preparation of a fee application as well as for its defense, Congress' inclusion of section 330(a)(6) specifically dealt with the preparation stage by permitting an award of compensation for "preparation of a fee application." Congress, however, did not enact a provision to allow an award of compensation for the defense of the application.

1. Legislative History

The legislative history surrounding the enactment of section 330(a)(6) in 1994 supports the conclusion that Congress did not intend to allow compensation for defending a fee application. On March 24, 1992, a subcommittee of the Senate Judiciary Committee held a hearing concerning "Certain Problems with Evaluating and Monitoring the Fees Charged by Professionals Against Estates in Bankruptcy." This hearing was the prelude to the 1994 amendments to section 330, which were introduced by Senator Howard Metzenbaum, who chaired the 1992 hearing and was the sponsor of those amendments, including section 330(a)(6). *See* 140 Cong. Rec. S. 4741 (daily ed. April 21, 1994).

High on the agenda of the 1992 hearing was

concern for the excessive attorney's fees received in bankruptcy cases. *See Hearing Before the Subcomm. on Courts and Administrative Practice of the S. Comm. on the Judiciary*, 102nd Cong. 102-1099 (March 24, 1992). In opening that hearing, Senator Metzenbaum stated: "Our bankruptcy system is not doing enough to protect a bankrupt company from those who would bleed its financial life by charging exorbitant fees." *Id.* at 3. Later in this hearing, the American Bankruptcy Institute urged the Subcommittee to recommend an amendment to section 330 that would authorize awards to trustee's attorneys and others employed under section 327 for *both* fee preparation and defense of a fee application, urging: "Reasonable time spent preparing and prosecuting fee applications should be expressly compensable." *Id.* at 190. Congress thereafter enacted section 330(a)(6) making preparation of a fee application compensable, but did not authorize awarding compensation for the defense of an application. *See Wireless*, 449 B.R. at 236-37 (observing that Congress rejected the American Bankruptcy Institute's request to make defense fees compensable).

2. A Pre-1994 Split In The Case Law Was Resolved By Congress Against Allowing Compensation For Defending A Fee Application

Prior to 1994, some courts allowed fees for preparation of a fee application, but not for the defense of an application. *See, e.g., In re DN Assoc.*, 165 B.R. 344 (Bankr. D.Me. 1994); *In re Jessee*, 77 B.R. 59 (Bankr. W.D.Va. 1987). *Others* allowed fees for both application preparation and defense. *See, e.g., In re Nucorp Energy, Inc.*, 764

F.2d 655 (9th Cir. 1985); *In re CF & I Fabricators of Utah, Inc.*, 131 B.R. 474 (Bankr. D.Utah 1991); *In re Wildman*, 72 B.R. 700 (Bankr. N.D.Ill. 1987); *In re Bible Deliverance Evangelistic Church*, 39 B.R. 768 (Bankr. E.D.Pa. 1984). *Still others* did not allow either application preparation or defense fees. *See, e.g., In re Courson*, 138 B.R. 928 (Bankr. N.D.Iowa 1992); *In re The Vogue*, 92 B.R. 717 (Bankr. E.D.Mich. 1988); *In re McClanahan*, 137 B.R. 73 (Bankr. M.D.Fla. 1992); *In re Alan I.W. Frank Corp.*, 71 B.R. 585 (Bankr. E.D.Pa. 1987); *In re Wilson Foods Corp.*, 36 B.R. 317 (Bankr. W.D.Okla. 1984); *In re Four Star Terminals, Inc.*, 42 B.R. 419 (Bankr. D. Alaska 1984); *In re The Liberal Market, Inc.*, 24 B.R. 653 (Bankr. S.D.Ohio 1982).

Congress resolved the dispute in the case law by making preparation of a fee application compensable, and by declining to authorize an award for the time devoted to litigating the defense of the application. In enacting section 330(a)(6) in 1994, Congress acknowledged the lack of judicial uniformity regarding the compensability for preparing a fee application and for the defense of a disputed application. *See* 140 Cong. Rec. H. 10,769 (daily ed. October 4, 1994) (recognizing the need to "foster greater uniformity in the application for and processing and approval of fee applications"). When enacting section 330(a)(6), Congress was deemed to know of this division of authority on this issue. *See Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 648 (2010) ("[W]hen Congress enacts statutes, it is aware of relevant judicial precedent."); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988); *United States v. Male Juvenile*, 280 F.3d 1008, 1016 (9th Cir. 2002); *United States*

v. Alvarez-Hernandez, 478 F.3d 1060, 1065 (9th Cir. 2007). Congress chose not to make the defense of a fee application compensable.

Permitting attorneys to be compensated for defending their fees, as petitioners seek to do, would impermissibly enlarge section 330(a)(6). *See Iselin v. United States*, 270 U.S. 245, 251 (1926) ("What the government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function."); *Lamie*, 540 U.S. at 538 (reading an "absent word" into a statute "result[s] 'not [in] a construction of [the] statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope.'"). Moreover, Congress does not alter existing law vaguely *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) ("Congress does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not hide elephants in mouseholes."). If Congress had intended to allow compensation for both preparation and defense of a fee application, it would have said so clearly and explicitly.

3. *Expressio unius est exclusio alterius*

The established canon of construction "*expressio unius est exclusio alterius*" provides an additional reason why the defense of a fee application is not compensable. That canon means that when Congress includes one specific item in a statute, it excludes other similar items not enumerated.

Holland v. Florida, 560 U.S. 631, 648 (2010) ("[T]o include one item is to exclude other similar items."). By Congress explicitly providing for compensation for *preparation* of an application, especially in light of its knowledge of a split of authority on the fee defense issue, Congress clearly excluded compensation for *fee defense*. *See O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86 (1994); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993); *Andrus v. Glover Const. Co.*, 446 U.S. 608, 616-17 (1980).

D. Section 330(a) Should Be Construed as Not Authorizing Compensation for Defending a Fee Application Because It Would Reduce the Funds Available for Paying Priority and Other Claims, and Could Stand in the Way of Confirming a Plan of Reorganization

Congress determined that because certain claims in a bankruptcy case either benefit the estate or have an important public purpose, they should have priority of distribution of estate assets over many other claims in the case. By virtue of section 507(a)(2), Congress determined that claims for compensation allowed under section 330(a)(1), which are accorded administrative expense status under section 503(b)(2), are entitled to priority of distribution from estate assets, along with a host of other claims accorded priority by section 507.

However, Congress determined that priority treatment for awards of compensation for a professional's services warrant priority treatment only

for services that the trustee *needs*, and prohibited such treatment for services that were "not reasonably likely to benefit the debtor's estate." *See* sections 330(a)(1)(A) and 330(a)(4)(A)(ii)(I). Congress understood that absent either necessity or a benefit to the estate, it would be unfair to all of the other priority claimants, as well as the general unsecured creditors, to treat the claims for professional compensation better than those of the general unsecured creditors.

Reading section 330(a)(1) as permitting compensation for defense of fee applications would controvert the purpose of the overall bankruptcy priority structure created by Congress, because to do so would unfairly shrink the funds of the estate available for distribution to priority as well as other claimants. *In re Flight Transp. Corp. Securities Litig.*, 874 F.2d 576, 581 (8th Cir. 1989) ("Administrative expenses under § 503(b) constitute priority claims which are paid directly out of the bankruptcy estate. Their allowance may diminish the recovery of creditors and other claimants."). In addition, because awards of compensation under section 330(a)(1) must be paid in cash in full in order to confirm a plan of reorganization under chapter 9 and chapter 11 or the Code, as provided by sections 943(b)(5) and section 1129(a)(9)(A), section 330(a)(1) should be narrowly read as not allowing compensation for defending a disputed fee application so as avoid delaying or even precluding plan confirmation.

For these reasons, administrative expense priority provisions, including awards for professional compensation, are narrowly construed. *See In re Dant & Russell, Inc.*, 853 F.2d 700, 706 (9th Cir.

1988) (stating that the word "necessary" is to be "construed narrowly so as to keep fees and administrative costs at a minimum") (internal citations omitted). Under that principle, section 330(a)(1) should be narrowly construed as not allowing administrative expense priority for a trustee's attorney's effort to defeat objections to its fee application. Moreover, courts narrowly construe priority claims, including administrative expense claims, in order to maximize the estate for the benefit or all creditors. *See In re Federated Dept. Stores, Inc.*, 270 F.3d 994, 1000 (6th Cir. 2001); *In re Colortex Indus., Inc.*, 19 F.3d 1371, 1377 (11th Cir. 1994); *In re Amarex*, 853 F.2d 1526, 1530 (10th Cir. 1988); *In re Bethlehem Steel Corp.*, 479 F.3d 167, 172 (2nd Cir. 2007); *In re United Trucking Service, Inc.*, 851 F.2d 159, 164 (6th Cir. 1988); *Trustees of Amalgamated Ins. Fund v. McFarlin's, Inc.*, 789 F.2d 98, 100 (2d Cir. 1986); *In re Flight Transp. Corp. Securities Litig.*, 874 F.2d at 581; *In re Finley, Kumble, Heine, Underberg, Manley, Meyerson and Casey*, 160 B.R. 882, 891 (Bankr. S.D.N.Y. 1991); *In re O.P.M. Leasing Svcs., Inc.*, 23 B.R. 104, 121 (Bankr. S.D.N.Y. 1982).

Section 330(a)(1), as a statutory priority provision, should thus be narrowly construed in order to maximize the estate for the benefit of the priority and the general creditors, and not to increase the difficulty to confirm a plan of reorganization under chapter 9 or chapter 11.

E. There Was No Pre-Code Practice of Allowing Fees for the Defense of Fee Applications

The "Bankruptcy Law Scholars'" *amicus* brief (the "BLS brief") asserts that there was a "pre-Code practice of allowing fees for defending fee applications," *see* BLS brief at 3, and that such asserted practice guides the interpretation of the Code. *See* BLS brief at 14-16. However, the pre-Code authorities it cites do not support its assertion, and actually call for the disallowance of defense fees by a bankruptcy court. The only court decision involving defense fees which the BLS brief relied upon to show that there was such a purported pre-Code practice, is *Matter of Arkansas Fuel Oil Corp.*, 234 F.Supp. 31 (D. Del. 1964), which *denied* an award for preparing and presenting a fee application both to the district court and the Securities and Exchange Commission ("SEC"). In so ruling, the court stated:

> A litigant should not be discouraged or penalized *for strenuously waging his cause* before any proper tribunal, if such action is not capricious or frivolous. I cannot see how it would be proper, absent capriciousness or frivolity on the part of [the party who objected to the fee application], to penalize it by awarding additional fees and allowances simply because it pursued one of the statutory avenues open to it.

Id. at 40 (emphasis added).

In *Arkansas Fuel*, the court relied on its earlier decision in *Matter of United Corp.*, 184 F Supp. 502 (D. Del. 1960), which, in stating that "the litigation costs of obtaining a fee are not compensable," quoted the SEC's position in that case, i.e. that an allowance could not be made by a district court in a bankruptcy case under Chapter X of the former Bankruptcy Act:

> [A] fee claimant is *not* entitled to compensation for preparing and presenting his own request for an allowance to the tribunals which must *initially* pass upon them, i.e., this Commission and the District Court in Section 11(e) proceedings and *the District Court in Chapter X (11 U.S.C.A. 501, et seq.) proceedings.*" (emphasis added).

184 F Supp at 513, n. 35. *See also Matter of United Corp.*, 39 S.E.C. 391, 0059 WL 59228 at *5 (1959) (same). Moreover, contrary to the contention of the BLS brief, the SEC made it clear in *Matter of United Corp.* that there was a "general rule against allowances for presenting fee applications in reorganization proceedings referred to above." *Id.* at *7.[6]

The SEC's opinion in *Matter of United Corp.* also stated that, while compensation may not be allowed for preparing and presenting one's own fee request to the SEC and the district court as "the tribunals which must *initially* pass upon them," an allowance may be made "in connection

[6] It is noted that, to support its contention that defense fees were allowable, the BLS brief's note 34 cited two cases, neither of which allowed or even mentioned defense fees.

with the successful defense, *on appeal* by others, of an award made to the applicant by the fee tribunals," and that such allowance may be made "for the services required *to defend the initial allowance.*" *Id.* at *5 (emphasis added). However, even if that principle were applicable in a case under the Code, it would not support an allowance by the bankruptcy court below as the tribunal "which must initially pass upon them," for services to obtain the initial allowance.

The BLS brief not only fails to support its assertion that there was a purported pre-Code practice for the courts of bankruptcy to allow fees for defending fee applications, but indeed demonstrates that there was no such practice. Indeed, the BLS brief actually shows that there was a pre-Code practice *not* to allow the courts of bankruptcy to award fee defense fees, and it is *that* practice that Congress presumably intended to be carried into the Code. *See Cohen v. de la Cruz,* 523 U.S. 213, 221 (1990) ("We, however, will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.") (internal citations omitted); *Emil v. Hanley,* 318 U.S. at 521 (stating if Congress had intended to effect a major change in the bankruptcy law, "some clear and unambiguous indication of that purpose would appear.").

If the Court were to look beyond the plain meaning of sections 327(a) and 330(a)(1), the *amici* urge the Court to construe those provisions in accordance with Congress' evident intention not to authorize an award of fee defense fees to a trustee's attorney.

CONCLUSION

Based on the foregoing and on Respondent's Brief, the order appealed from should be affirmed.

Respectfully submitted,

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BAKER BOTTS L.L.P. AND JORDAN, HYDEN, WOMBLE, CULBRETH & HOLZER, P.C.,

Petitioners,

v.

ASARCO LLC,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR *AMICI CURIAE* BANKRUPTCY LAW SCHOLARS IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. PRE-BANKRUPTCY CODE REQUIREMENTS OF ECONOMY MANDATED LIMITED FEE AWARDS 4

A. Equity Receiverships 5

B. Section 77B Brings Reorganization Law Under the 1898 Act 6

C. The Chandler Act Replaces Section 77B 10

D. Bankruptcy Rules 11

II. UNDER THE FORMER BANKRUPTCY ACT, COURTS HAD DISCRETION TO CONSIDER AND AWARD DEFENSE FEES IN APPROPRIATE CIRCUMSTANCES 14

III. CONGRESS ENACTED SECTION 330(A) TO ENSURE BANKRUPTCY PROFESSIONALS WOULD BE COMPENSATED AT MARKET RATES, INCLUDING FOR PREPARATION OF FEE APPLICATIONS, WITHOUT CHANGING THE LAW ON "FEE DEFENSE" FEES 17

TABLE OF CONTENTS – Continued

Page

IV. FEE DEFENSE FEES ARE AWARDED IN COMPARABLE NON-BANKRUPTCY CONTEXTS 21

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES:

Auto Alliance Int'l, Inc. v. U.S. Customs Serv., 155 Fed. App'x 226 (6th Cir. 2005) 24

Bagby v. Beal, 606 F.2d 411 (3d Cir. 1979) 23

Bd. of Trs. of Hotel & Rest. Emps. Local 25 v. JPR, Inc., 136 F.3d 794 (D.C. Cir. 1998) 24

Brown v. Gerdes, 321 U.S. 178 (1944).....6

Callaghan v. Reconstr. Fin. Corp., 297 U.S. 464 (1936).....8

Camacho v. Bridgeport Fin., Inc., 523 F.3d 973 (9th Cir. 2008) 24

Cohen v. de la Cruz, 523 U.S. 213 (1998) 17

Commissioner, I.N.S. v. Jean, 496 U.S. 154 (1990).....22, 23

Davis v. Bd. of Sch. Comm'rs, 526 F.2d 865 (5th Cir. 1976).....24

Fegley v. Higgins, 19 F.3d 1126 (6th Cir. 1994).....24

Finn v. Childs Co., 181 F.2d 431 (2d Cir. 1950).....13

Gagne v. Maher, 594 F.2d 336 (2d Cir. 1979), *aff'd*, 448 U.S. 122 (1980).....22, 23

Gonter v. Hunt Valve Co., 510 F.3d 610 (6th Cir. 2007).....24

Greensfelder v. St. Louis Pub. Serv. Co., 114 F.2d 53 (8th Cir. 1940) 13

TABLE OF AUTHORITIES – Continued

Page

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In re Ark. Fuel Oil Corp., Cities Serv. Co., 234 F. Supp. 31 (D. Del. 1964) 15

In re Carolina Cooperage Co., 96 F. 950 (E.D.N.C. 1899) 12

In re Detroit Int'l Bridge Co., 111 F.2d 235 (6th Cir. 1940) 16

In re Mt. Forest Fur Farms of Am., 157 F.2d 640 (6th Cir. 1946) 13

In re Mullendore, 527 F.2d 1031 (10th Cir. 1975) 14

In re Nucorp Energy, Inc., 764 F.2d 655 (9th Cir. 1985). 21, 22, 24, 25

In re Oppenheimer, 146 F. 140 (M.D. Pa. 1906) 12

In re Paramount Publix Corp., 83 F.2d 406 (2d Cir. 1936) 7

In re Pilgrim's Pride Corp., 690 F.3d 650 (5th Cir. 2012) 23

In re Solar Mfg. Corp., 206 F.2d 780 (3d Cir. 1953) 14

In re Standard Gas & Elec. Co., 106 F.2d 215 (3d Cir. 1939) 13

In re United Corp., File No. 54-184-1, 39 S.E.C. 391, 0059 WL 59228 (Sept. 30, 1954) 15, 16

TABLE OF AUTHORITIES – Continued

Page

In re W. Counties Constr. Co., 182 F.2d 409 (7th Cir. 1950) 13

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974) 23

Johnson v. Mississippi, 606 F.2d 635 (5th Cir. 1979) 23

Mass. Mut. Life Ins. Co. v. Brock, 405 F.2d 429 (5th Cir. 1968) 11, 20

Matter of Beverly Crest Convalescent Hosp., Inc., 548 F.2d 817 (9th Cir. 1976) 20

Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 474 U.S. 494 (1986) 17

Milbank, Tweed & Hope v. McCue, 111 F.2d 100 (4th Cir. 1940) 13

Official Creditors' Comm. of Fox Markets, Inc. v. Ely, 337 F.2d 461 (9th Cir. 1964) 13

Pawlak v. Greenawalt, 713 F.2d 972 (3d Cir. 1983) 24

Pennsylvania Pub. Welfare Dep't. v. Davenport, 495 U.S. 552 (1990) 17

Porzig v. Dresdner, Kleinwort, Benson, N. Am., LLC, 497 F.3d 133 (2d Cir. 2007) 23

Prandini v. Nat'l Tea Co., 585 F.2d 47 (3d Cir. 1978) 23, 25

Pub. Interest Research Group of N.J., Inc. v. Windall, 51 F.3d 1179 (3d Cir. 1995) 24

TABLE OF AUTHORITIES – Continued

Page

Saldivar v. Rodela, 894 F. Supp. 2d 916 (W.D. Tex. 2012) 24

Scribner & Miller v. Conway, 238 F.2d 905 (2d Cir. 1956) 16

Sec. & Exchange Comm'n v. Cogan, 201 F.2d 78 (9th Cir. 1951) 16

Standard Gas & Elec. Co. v. S.E.C., 212 F.2d 407 (8th Cir. 1954) 15

Stark v. Woods Bros. Corp., 109 F.2d 969 (8th Cir. 1940) 13

Surface Transit, Inc. v. Saxe, Bacon & O'Shea, 266 F.2d 862 (2d Cir. 1959) 16

Torres v. Sachs, 69 F.R.D. 343 (S.D.N.Y. 1975) 24

United States v. Chicago, M., St. P. & P.R. Co., 282 U.S. 311 (1931) 6

York Int'l Bldg., Inc. v. Chaney (In re York Int'l Bldg., Inc.), 527 F.2d 1061 (9th Cir. 1975) 13

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STATUTES:

5 U.S.C. § 552(a)(4)(E)(i) 24

11 U.S.C. § 107 (1934) (repealed 1978) 4

11 U.S.C. § 207(c)(9) 7

11 U.S.C. § 330 ..... 14, 17, 18, 21, 23

TABLE OF AUTHORITIES – Continued

Page

11 U.S.C. § 330(a)(3)(F) 21
11 U.S.C. § 330(a)(6) 18
11 U.S.C. § 350 18
11 U.S.C. § 501 (1938) (repealed 1978) 4
11 U.S.C. § 1123(a)(9)(A) 18
15 U.S.C. § 79k(f) 16
15 U.S.C. § 1692k(a)(3) 24
18 U.S.C. § 155 10
20 U.S.C. § 1617 24
22 U.S.C. § 9007(b)(3) 24
28 U.S.C. § 2075 (1970) 12
29 U.S.C. § 216(b) 24
29 U.S.C. §§ 401-531 24
29 U.S.C. § 626 23
29 U.S.C. § 1132(g)(2)(D) 24
31 U.S.C. § 3730 24
33 U.S.C. § 928 24
33 U.S.C. § 1365(d) 24
42 U.S.C. § 1973(e) 24
42 U.S.C. § 1988 23
42 U.S.C. § 3612(c) 23
42 U.S.C. § 3612(p) 23

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 11607(b)(3) 24

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RULES AND REGULATIONS:

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FED. R. BANKR. P. 219(c)(1) (repealed) in 411 U.S. at 1036 ..... 12, 14

S.E.C. Release No. 35-1939 16

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OTHER AUTHORITIES:

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Bankruptcy Reform Act of 1994, § 224(b), Pub. L. No. 103-394 (Oct. 22, 1994) 21

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TABLE OF AUTHORITIES – Continued

Page

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H.R. REP. NO. 595, at 329-30 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6286. 20

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¶ 0.03 5

¶ 0.04[2.3] 6

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¶ 13.01 .....6, 7, 11

¶ 13.02 .....7, 10, 13, 16

Professional Fees in Bankruptcy: Hearing on Certain Problems Associated with Evaluating and Monitoring the Fees Charged by Professionals Against Estates in Bankruptcy Before the Subcomm. on Courts and Administrative Practice of the S. Comm. on the Judiciary, 102d Cong. 1 (1992) 18, 19

TABLE OF AUTHORITIES – Continued

Page

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United States Supreme Court, General Order, 411 U.S. 991 (1973) 12

United States Supreme Court, General Order, 267 U.S. 613 (1925) 12

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici Curiae are law professors who teach and write in the field of bankruptcy law.[1] *Amici* are not predisposed to systematically advance the parochial interests of debtors or creditors or federal or state governmental bodies.[2] They file this brief because of their academic interest in promoting the coherent interpretation of the Bankruptcy Code and the

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[1] *Amici* file this brief with the written consent of all parties. Supreme Court Rule 37. No counsel for a party authored this brief in whole or in part. No person or entity including *Amici* or their counsel made a monetary contribution for the preparation or submission of this brief; it has been prepared *pro bono publico*. Professor Kenneth N. Klee was engaged by Baker & Botts LLP to serve as an expert witness on behalf of the ASARCO LLC bankruptcy estate in connection with the substantive issues out of which this subsequent fee litigation arose. That engagement is long terminated. Neither Mr. Klee nor his firm, Klee Tuchin Bogdanoff & Stern LLP, has been involved in the dispute over the legal fees at issue in this case.

[2] Douglas G. Baird is Professor of Law at the University of Chicago Law School. Daniel J. Bussel is a Professor of Law at the University of California, Los Angeles (UCLA) School of Law. Laura B. Bartell is a Professor of Law at Wayne State University. Kenneth N. Klee is a Professor of Law Emeritus at the UCLA School of Law. Stephen Lubben is a Professor of Law at Seton Hall University School of Law. Bruce A. Markell is a Professor of Law at Florida State University College of Law and a Visiting Professor at Northwestern University School of Law. Charles W. Mooney, Jr. is a Professor of Law at the University of Pennsylvania Law School. Scott Pryor is a Professor of Law at Regent University School of Law. David Skeel is a Professor of Law at the University of Pennsylvania Law School. Messrs. Bussel, Klee, Markell and Pryor are also members of this Court's bar.

effective and efficient functioning of the bankruptcy system.

SUMMARY OF ARGUMENT

Before enactment of the Bankruptcy Reform Act of 1978, courts supervising corporate reorganizations exercised discretion to authorize the payment of fees incurred by estate professionals in successfully defending objections to their fee applications.

In the allowance of professional fees and expenses, however, they applied a "principle of economy" that had the effect of imposing below-market fees on those bankruptcy professionals whose fees were subject to court supervision, and generally precluded recovery of the expenses of routine preparation of fee applications.

This Court has often noted that established pre-Code bankruptcy practices, when not inconsistent with the express terms of the Bankruptcy Code, continue to guide the interpretation of the Bankruptcy Code. Thus, understanding this pre-Code background is imperative to properly construing the current provisions of the Bankruptcy Code relating to the compensation of estate professionals.

In 1978, Congress deliberately liberalized the allowance of fees by eliminating the "principle of economy." In rejecting this pre-Code limiting principle on fee allowance, Congress expressed no intention of

upsetting the longstanding understanding that a court supervising the allowance of fees in a reorganization proceeding retained discretion to allow fees incurred in successfully overcoming meritless objections to fee allowance.

Indeed, continuing the pre-Code practice of allowing fees for defending fee applications was consistent with Congress's overall objective in 1978 to ensure that professionals who devoted themselves to bankruptcy practice would not be limited to substandard fees as had been the case under prior law, but rather would be compensated in a manner equivalent to professionals of comparable skill, experience and ability retained by private clients in comparable non-bankruptcy representation.

Most lawyers, of course, are not in the position of having to litigate the reasonableness of their fees with anyone other than the client that engaged them, much less multiple adversaries of that client. So the issue of compensation for the defense of objections to fee allowance is not routine in most commercial practices. In contrast, any party in interest may object to any bankruptcy estate professional's proposed fees.

Fee applications and objections thereto are not unique to bankruptcy. In comparable circumstances when fees are court-approved, including federal statutes providing for fee shifting under court supervision, courts hearing objections generally allow fees for a successful defense – a practice upheld by this

Court. Such additional defensive fees are included to avoid diluting fee awards by imposing the expense of meritless fee litigation on the applicant. Congress's policy of comparability to non-bankruptcy practice, as well as the parallel long-established pre-Code practice under prior bankruptcy law, accordingly mandates allowance of defense fees in bankruptcy cases subject to the discretion of the supervising court.

ARGUMENT

I. PRE-BANKRUPTCY CODE REQUIREMENTS OF ECONOMY MANDATED LIMITED FEE AWARDS.

Before the Bankruptcy Reform Act of 1978 (as subsequently amended, the "Bankruptcy Code"),[3] reorganization law was governed in turn by case law developed in federal equity receivership proceedings, Section 77B of the Bankruptcy Act of 1898 (enacted 1934), and the Chandler Act (enacted 1938).[4]

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[3] Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at title 11, United States Code).

[4] Bankruptcy Act of 1898, 30 Stat. 544 (1898) (repealed 1978); § 77B, 48 Stat. 911, 11 U.S.C. § 107 (1934) (repealed 1978); Chandler Act, Chapter X, 52 Stat. 840, 883, 11 U.S.C. § 501 (1938) (repealed 1978).

A. Equity Receiverships.

The 1898 Bankruptcy Act included provisions for "compositions," as well as liquidations, but prior to 1934, most business restructuring occurred through federal equity receiverships rather than under the 1898 Act.[5] Not only counsel for debtors and receivers, but also for multiple committees of stockholders, reorganization managers, and creditors, received compensation for their participation in the reorganization

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[5] Bankruptcy Act of 1898, § 12, 30 Stat. 544, 563 (1898) (repealed 1978); 6 JAMES WM. MOORE, ET AL., COLLIER ON BANKRUPTCY ¶ 0.03 at 21-28 (14th ed. 1978) [hereinafter COLLIER 14TH] (discussing limitations on bankruptcy compositions, including lack of provisions to address secured debt); *see* Securities and Exchange Commission, REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL AND FUNCTIONS OF PROTECTIVE AND REORGANIZATION COMMITTEES, PART I at 869 (1937) [hereinafter 1937 SEC REPORT] ("Prior to the enactment of Section 77 and Section 77B of the Bankruptcy Act, the favored method for effecting a corporate reorganization was through the federal consent receivership."); Securities and Exchange Commission, REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL AND FUNCTIONS OF PROTECTIVE AND REORGANIZATION COMMITTEES, PART VIII 250 at 61 (1940) [hereinafter 1940 SEC REPORT] ("Prior to the enactment of Sections 77 and 77B, there was seldom resort to the provisions of the Bankruptcy Act for the purpose of effecting the reorganization of corporations whose securities were held by the general public. When such enterprises became involved in financial difficulties serious enough to entail judicial proceedings, they were customarily reorganized through the medium of equity receivership despite the disadvantages and limitations of that procedure. . . ").

under agreed plans.[6] Little or no court supervision of these fees occurred, and litigating fee objections was not a material part of reorganization practice in the pre-1934 period.[7]

B. Section 77B Brings Reorganization Law Under the 1898 Act.

One of the purposes of amending the 1898 Act to include Section 77B in 1934 was "the desire to reduce the costs of reorganization."[8]

In Section 77B reorganizations, committees and interested parties could no longer set their own fees by private agreements or plan provisions.[9] Section 77B(c)(9) provided that the supervising court "may allow a reasonable compensation for the services

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[6] *See United States v. Chicago, M., St. P. & P.R. Co.*, 282 U.S. 311, 319-20 (1931) (describing equity receivership plan compensation provisions for multiple committees of creditors, stockholders and managers).

[7] 6 COLLIER 14TH ¶ 0.04[2.3] at 58 ("[T]he receivership mechanism afforded only a perfunctory examination on the fairness of the essential phases of the proposed plan, since the theory was that the court could not control the plan . . [and] [t]he receivership itself was costly and wasteful."); *United States v. Chicago*, 282 U.S. at 324-28 (holding that the power to regulate commerce did not authorize regulation of equity receivership plan compensation provisions).

[8] *Brown v. Gerdes*, 321 U.S. 178, 181 (1944) ("Sec. 77B, like § 77 of the Bankruptcy Act, had as one of its purposes the establishment of more effective control over reorganization fees and expenses").

[9] 6A COLLIER 14TH ¶ 13.01 at 514 (14th ed. 1977).

rendered and reimbursement for the actual and necessary expenses incurred in connection with the proceeding and the plan by officers, parties in interest, depositaries, reorganization managers and committees or other representatives of creditors or stockholders, and the attorneys or agents of any of the foregoing and of the debtor."[10] Courts implemented this provision by applying strict standards of "benefit to the estate" which were perceived by some to impede the functioning of the reorganization process.[11]

Multiple committees of creditors and interested parties participated in Section 77B proceedings, but their fee requests were often denied as duplicative and beneficial only to those parties, not the estate. Even when courts found their services to be beneficial to the estate, however, attorneys still received low fee allowances under the "conservation of the estate" principle.[12] This Court held that economic administration restrictions on fees and expenses in bankruptcy cases under Section 77B must be strictly enforced "even when the compensation allowed was, in special

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[10] 11 U.S.C. § 207(c)(9); *see also In re Paramount Publix Corp.*, 83 F.2d 406, 407 (2d Cir. 1936) (discussing this provision).

[11] 6A COLLIER 14TH ¶ 13.01 at 516-17; Emmett McCaffery, *Corporate Reorganization Under the Chandler Bankruptcy Act*, 26 CALIF. L. REV. 643, 657-58 (1938); Alfred B. Teton, *Reorganization Revised*, 48 YALE L.J. 573, 603-04 (1939); 1940 SEC REPORT.

[12] Teton, *supra* n.11 at 606 (1939); 6A COLLIER 14TH ¶ 13.01 at 515-16, ¶ 13.02 at 542 n.45.

circumstances, materially less than that which otherwise might have been considered reasonable."[13]

Following the enactment of Section 77B, the Securities and Exchange Commission, under the direction of future Justice William O. Douglas, undertook an extensive study of the abuses of bankruptcy reorganizations by participants in the process to the detriment of investors. The study was undertaken in conjunction with the legislative process leading to enactment of the 1938 Chandler Act.[14] With respect to professional fees, the SEC Report stated that the "vice is that the bar has been charging all that the traffic will bear. It has forsaken the tradition that its members are officers of the court and should request and expect only modest fees."[15] The SEC found that the problem with fees arose when attorneys did not

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[13] *Callaghan v. Reconstr. Fin. Corp.*, 297 U.S. 464, 468 (1936); 1940 SEC REPORT at 244 ("Consistently with the policy thus disclosed by its legislative history, and with the policy of the Bankruptcy Act, of which it was an integral part, the courts demanded that proceedings under Section 77B be economically administered, and they construed strictly the limitations upon allowances, though this resulted in occasional hardship to an individual applicant."); *Developments in the Law: Reorganization Under Section 77B of the Bankruptcy Act – 1934-1936*, 49 HARV. L. REV. 1111, 1202 (1936) ("The courts have relied both on the need for economy in the administration of the corporate assets and on the policy adopted of giving participants in the reorganization the character of court officers, entitled to receive less than would be their due were they agents of parties not involved in judicial proceedings.").

[14] *See* 1937 SEC REPORT; 1940 SEC REPORT.

[15] 1937 SEC REPORT at 215.

"promote reorganization expeditiously, economically, and solely in the interests of investors,"[16] but also found that "compensation was not always excessive" and "[t]he importance of the role of lawyers in reorganizations is difficult to overemphasize."[17]

The SEC further advised that the principle of economy had severe drawbacks that "were likely in some measure to react to the detriment of investors, especially as reorganization proceedings under Section 77B tended to become the exclusive bailiwick of those accustomed in the past to dominate equity reorganizations."[18] The SEC therefore recommended

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[16] 1937 SEC REPORT at 211-12.

[17] *Id.* at 213; *see id.* ("They advise receivers and trustees with respect to virtually every step taken which does not concern the detailed operation of the particular business. They aid in the formulation of the policies of committees, draft the deposit agreement and reorganization plan, and defend them against attack. . . . The determination of the relative rights of security holders may require negotiation or litigation by attorneys. . . . Attorneys must be employed for these tasks and *are entitled to fair and reasonable compensation.*" (emphasis added)).

[18] 1940 SEC REPORT at 252. For example, objecting minorities, "however honest[ ] and abl[e]," were not compensated; "attorneys were deemed not connected with 'benefit to the estate' if they were concerned entirely with seeking more favorable terms in the plan of reorganization for those whom they represented"; although Section 77B(c) "afforded all creditors and stockholders the right to be heard on the proposed confirmation of a plan," compensation to their counsel "was almost uniformly denied," even for "interveners with substantial holdings who forced material changes in the plan adopted"; and, once a committee was in the field, usually dominated by the debtor, any

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that, unlike the practice under Section 77B, "[r]easonable compensation for services rendered and reimbursement for proper costs and expenses incurred by parties in interest and their attorneys in connection with the administration of the estate or with a plan of reorganization should be allowed by the court."[19]

C. The Chandler Act Replaces Section 77B.

The Chandler Act enacted Chapter X as the successor to Section 77B. Legislating on the basis of the SEC Report, the principal solutions in the Chandler Act to perceived problems under prior reorganization law were appointing disinterested trustees to displace management in large cases, restricting the role of multiple committees of creditors, and utilizing advisory assistance of the SEC, including with respect to SEC recommendations on professional fees.[20]

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subsequent committee seeking compensation was required to show "the need for separate representation, *i.e.*, that the existing committee was not honest or efficient or was otherwise disqualified." *Id.* at 249-52.

[19] 1937 SEC REPORT at 902.

[20] Teton, *supra* n.11 at 573; *see also* 6A COLLIER 14TH ¶ 13.02 at 528-29. The Borah Act in 1937 also made bankruptcy and receivership fee sharing a crime, which was extended in 1949 to include attorneys for parties in such cases. 18 U.S.C. § 155. *See* 1 HENRY J. SOMMER AND ALAN N. RESNICK, COLLIER ON BANKRUPTCY ¶ 7.05 at 7-107 – 7-111 (16th ed. 2014) [hereinafter COLLIER 16TH].

The Chandler Act included a detailed and comprehensive scheme for the supervision and allowance of reorganization fees and expenses.[21] Fee authorization was expanded and "democratized" to encourage participation by individuals and independent committees, but judicial control was strengthened.[22]

The principle of economy remained in effect under the Chandler Act, however. In *Massachusetts Mutual Life Insurance Co. v. Brock*, for example, the court remanded fee awards because the trial court failed to consider "the public interest which is inherent in bankruptcy matters," even though it had properly considered the time spent on the case by the trustee and his counsel, the complexity of the issues, and the commendable results achieved.[23]

D. Bankruptcy Rules.

This Court promulgated General Orders from time to time which governed procedures in bankruptcy

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[21] 6A COLLIER 14TH ¶ 13.01 at 519; *see also* Chandler Act, § 241, 52 Stat. 840, 900 (1938) (trustee, court officers, attorneys for debtors and petitioning creditors); *id.* § 242 (indenture trustees, committees, representatives of creditors or stockholders, other interested parties except the SEC, and attorneys for all); *id.* § 243 (creditors, stockholders and their attorneys in connection with plans); *id.* § 247, 52 Stat. 840, 901 (fee applications to be heard by the court upon notice); *id.* § 250, 52 Stat. 840, 901-02 (appeals of fee awards).

[22] 6A COLLIER 14TH ¶ 13.01 at 519-21.

[23] 405 F.2d 429, 432 (5th Cir. 1968).

courts.[24] Following passage of the Rules Enabling Act, the Court promulgated Federal Rules of Bankruptcy Procedures in 1973.[25]

Former Bankruptcy Rule 219 provided that compensation was allowable by the court "for services rendered in the administration of a bankrupt estate shall be reasonable, and in making allowances the court shall give due consideration to the nature, extent, and value of the services rendered as well as to the *conservation of the estate* and the interests of creditors."[26] As a result, although allowances from the estate were within the "sound judicial discretion of the court,"[27] "economy [was] strictly enjoined, by the well-known policy of the bankruptcy act "[28]

In Chapter X cases, fees were approved under procedures and guidelines set forth in former Rule 10-215.[29] Although not explicitly required by that

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[24] *E.g.*, 267 U.S. 613, 614 (1925) (XLII required that every attorney seeking an allowance of compensation from a bankrupt estate file a petition under oath with the referee, setting forth a full and detailed statement of services, amount claimed, and any partial allowance, accompanied by an affidavit regarding no agreement for sharing of fees).

[25] *See* 28 U.S.C. § 2075 (1970); 411 U.S. 991 (1973).

[26] FED. R. BANKR. P. 219(c)(1) (repealed) (emphasis added) in 411 U.S. at 1036.

[27] *In re Carolina Cooperage Co.*, 96 F. 950, 954 (E.D.N.C. 1899).

[28] *In re Oppenheimer*, 146 F. 140, 141 (M.D. Pa. 1906).

[29] *Id.*; FED. R. BANKR. P. 10-215 (repealed) in 421 U.S. 1019, 1050-53 (1975) (providing for "reasonable compensation for

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rule, the "principle of economy" still governed, and led courts to impose below-market fees on bankruptcy professionals.[30]

Courts interpreting Rule 10-215 looked to the value of the debtor's estate, the amount available for allowances, and the ability of the reorganized debtor to pay, in determining fee reasonableness.[31] Courts held that those rendering professional services could not expect to be compensated on a scale equal to that obtainable in private employment.[32] In some cases, courts would benchmark bankruptcy lawyers' fees against prevailing judicial salaries which then (as now) lagged market rates for attorney services in sophisticated commercial matters.[33]

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necessary services and reimbursement of necessary expenses incurred in a Chapter X case").

[30] 6A COLLIER 14TH ¶ 13.02 at 537; *Greensfelder v. St. Louis Pub. Serv. Co.*, 114 F.2d 53, 61 (8th Cir. 1940); *Milbank, Tweed & Hope v. McCue*, 111 F.2d 100, 101 (4th Cir. 1940).

[31] 6A COLLIER 14TH ¶ 13.02 at 538-39; *In re W. Counties Constr Co.*, 182 F.2d 409 (7th Cir. 1950); *Finn v. Childs Co.*, 181 F.2d 431, 435-36 (2d Cir. 1950).

[32] 6A COLLIER 14TH ¶ 13.02 at 539-40 n.37; *In re Mt. Forest Fur Farms of Am.*, 157 F.2d 640, 647 (6th Cir. 1946); *Stark v. Woods Bros. Corp.*, 109 F.2d 969 (8th Cir. 1940); *In re Standard Gas & Elec. Co.*, 106 F.2d 215, 216-17 (3d Cir. 1939).

[33] *See, e.g., Official Creditors' Comm. of Fox Markets, Inc. v. Ely*, 337 F.2d 461, 466 (9th Cir. 1964); *York Int'l Bldg., Inc. v. Chaney (In re York Int'l Bldg., Inc.)*, 527 F.2d 1061, 1073 (9th Cir. 1975).

Congress's 1978 comprehensive overhaul of bankruptcy law paid particular attention to reforming the pre-Code system of professional compensation. 11 U.S.C. Section 330 deliberately excised Rule 219's reference to "conservation of the estate and the interests of creditors" and substituted, as a required factor, "the cost of comparable services" in non-bankruptcy matters. The guiding principle of the 1978 reform was to encourage talented professionals to specialize in bankruptcy practice instead of retreating to seek more favorable fees in other areas of commercial law.

II. UNDER THE FORMER BANKRUPTCY ACT, COURTS HAD DISCRETION TO CONSIDER AND AWARD DEFENSE FEES IN APPROPRIATE CIRCUMSTANCES.

Under pre-Code law, subject to the principle of economy, district courts had "sound discretion" to determine "the proper amounts to be awarded to fee claimants in reorganization proceedings."[34] This was an equitable determination, with two components of direct import to this case:

(1) Professional fees incurred in *preparing* fee applications were subject to disallowance under the economy principle, which required "a balancing of the competing equities of the persons affected which in

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[34] *In re Solar Mfg. Corp.*, 206 F.2d 780, 781 (3d Cir. 1953); *see also In re Mullendore*, 527 F.2d 1031, 1038 (10th Cir. 1975).

the interests of fairness [courts] must make appropriate practical distinctions in distributing the costs of the burden of the litigation, [which] has been recognized as a salutary rule which helps preserve the assets of the estate."[35]

(2) Professional fees incurred in *defending* against a third party's objection to a fee award were granted, however, when the court – with input from the SEC – deemed the circumstances to be appropriate. *See In re Ark. Fuel Oil Corp., Cities Serv. Co.*, 234 F. Supp. 31, 39-40 (D. Del. 1964) (exercising discretion to deny fee litigation fees, but noting "policy of the Commission to allow supplemental fees wherever applicants have prevailed in the reviewing court").

As explained clearly in *In re United Corp.*, the pre-Code rationale behind denying fees for preparing fee applications "does not in our opinion apply to services and expenses in connection with the successful defense, on appeal by others, of an award made to the applicant by the fee tribunals. In such case we think equitable considerations justify the awarding of compensation for the services required to defend the initial allowance, and to the extent applicant's

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[35] *In re United Corp.*, File No. 54-184-1, 39 S.E.C. 391, 396, 0059 WL 59228, at *5 (Sept. 30, 1954) (internal quotation marks and alterations omitted) (and citing, *e.g.*, *Standard Gas & Elec. Co. v. S.E.C.*, 212 F.2d 407, 413 (8th Cir. 1954) (fees allowance expenditures generally denied, but portion allowed as incurred at SEC's request)).

request relates to services of that nature it is entitled to favorable consideration."[36]

The SEC served an important advisory role in Chapter X cases.[37] Because of the SEC's statutory role in Chapter X cases in reviewing attorneys' fee applications and recommending appropriate allowances, and given its stature as a disinterested agency experienced in reorganization affairs, courts granted considerable weight to the SEC's views on fees.[38]

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[36] 39 S.E.C. at 396-97, 0059 WL 59228, at *5.

[37] *See, e.g., Surface Transit, Inc. v. Saxe, Bacon & O'Shea*, 266 F.2d 862 (2d Cir. 1959) ("[T]he recommendations of the Securities and Exchange Commission, representative of the public interest, are entitled to great weight."). *See Sec. & Exchange Comm'n v. Cogan*, 201 F.2d 78 & n.5 (9th Cir. 1951) (quoting 15 U.S.C. § 79k(f)); SEC Rules and Regulations under the Public Utility Holding Company Act of 1935 (1938), Rule U-11F-2, *quoted in* S.E.C. Release No. 35-1939 at *4 n.1, 1939 WL 37605 (Feb. 23, 1940).

[38] 6A COLLIER 14TH ¶ 13.02 at 529-30; *Scribner & Miller v. Conway*, 238 F.2d 905 (2d Cir. 1956) (SEC recommendations should be followed unless court shows reasons otherwise based on specific findings); *In re Detroit Int'l Bridge Co.*, 111 F.2d 235, 238 (6th Cir. 1940) (SEC recommendations entitled to weight, but not conclusive).

III. CONGRESS ENACTED SECTION 330(A) TO ENSURE BANKRUPTCY PROFESSIONALS WOULD BE COMPENSATED AT MARKET RATES, INCLUDING FOR PREPARATION OF FEE APPLICATIONS, WITHOUT CHANGING THE LAW ON "FEE DEFENSE" FEES.

Pre-Code bankruptcy practice guides interpretation of the Bankruptcy Code, except to the extent that practice is inconsistent with new statutory language.[39] "We will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure."[40]

In Section 330, Congress set forth five factors for courts to use in fixing "reasonable compensation for actual, necessary services" performed by bankruptcy professionals: "the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title."[41]

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[39] *See, e.g.*, *Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific . . . . The Court has followed this rule with particular care in construing the scope of bankruptcy codifications.") (citations omitted).

[40] *Cohen v. de la Cruz*, 523 U.S. 213, 221 (1998), quoting *Pennsylvania Pub. Welfare Dep't. v. Davenport*, 495 U.S. 552, 563-64 (1990).

[41] 11 U.S.C. § 330 (1978), *as reprinted in* COLLIER 16TH, B Appx. pt. 4(a) at 4-22 (currently expanded as set forth below).

Neither Section 330 nor any other part of the Bankruptcy Code rejects or alters pre-Code law allowing professional fees incurred in the defense of fee application objections in appropriate circumstances. Final fee rulings on such objections are plainly "necessary services" as the allowance of fees must be made before all bankruptcy estate assets can be distributed to administrative and prepetition claimants and the case can be closed.[42]

Likewise, preparation of fee applications that are required before fees can be awarded are plainly "necessary services" – without that work, bankruptcy courts cannot determine whether compensability criteria in Bankruptcy Code Sections 330 and 331 and Federal Rule of Bankruptcy Procedure 2014 have been met. Inclusion of such fees as a type of necessary work, payable upon termination of the principle of economy, was clarified by the 1994 enactment of Section 330(a)(6), setting forth compensability standards for that routine, although time-consuming, task.[43] The legislative history of that provision shows Congress's concern that professionals were charging "hefty fees just for preparing their bills."[44]

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[42] *See* 11 U.S.C. § 350 (requiring case to be fully administered before it is closed); § 1123(a)(9)(A) (administrative expenses, including allowed fees, must be fully paid or provided for in order to confirm a reorganization plan).

[43] 11 U.S.C. § 330(a)(6).

[44] *Professional Fees in Bankruptcy: Hearing on Certain Problems Associated with Evaluating and Monitoring the Fees*

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Compensability of fee application services and the award of fees in appropriate cases for defending fee challenges are informed by Congress's expressed intention that supervising courts consider the cost of comparable services in non-bankruptcy cases in allowing compensation. The requirement to consider fees paid to other, non-bankruptcy professionals was added to implement the "policy of this Section to compensate attorneys and other professionals serving in a case under title 11 at the same rate as the attorney or other professional would be compensated for performing comparable services other than in a case under title 11."[45] Fee defense is not a routine task. It can, as in this case, involve complex, hotly contested adversary litigation.

Charged by Professionals Against Estates in Bankruptcy Before the Subcomm. on Courts and Administrative Practice of the S. Comm. on the Judiciary, 102d Cong. 4 (1992) (statement of the Hon. Howard M. Metzenbaum, United States Senator); *id.* at 65-67 (statement of Marcy J.K. Tiffany, U.S. Trustee, Region 16) (explaining that fee application fees are permitted under case law, and that unlike non-bankruptcy cases, court appearances are required for fee approval in bankruptcy, but amounts billed may be excessive); *id.* at 122 (statement of Keith Shapiro, partner at law firm of Holleb & Coff) ("While the majority of surveyed courts allow full compensation for time spent complying with applicable fee statutes and rules, a significant number of courts do not . . . [which] is yet another example of a lack of uniformity in the application of the Code's fee provisions which could be rectified by a simple amendment."); *id.* at 157-58 (Keith Shapiro's explanation that fee applications are more complex than preparation of invoices).

[45] 124 CONG. REC. H11,091-92 (daily ed. Sept. 28, 1978); 124 CONG. REC. S17,408 (daily ed. Oct. 6, 1978).

Indeed, the legislative history shows that the House of Representatives, whose version of this Code provision was ultimately enacted, intended by that language "to overrule *Matter of Beverly Crest Convalescent Hospital, Inc.*, 548 F.2d 817 (9th Cir. 1976), which set an arbitrary limit on fees payable, based on the amount of a district judge's salary, and other, similar cases that require fees to be determined based on notions of conservation of the estate and economy of administration."[46] The House explained that "[i]f that case were allowed to stand, attorneys that could earn much higher incomes in other fields would leave the bankruptcy arena."[47] In enacting the final version of the Bankruptcy Reform Act of 1978, the House also expressly overruled *Massachusetts Mutual Life Insurance Co. v. Brock*,[48] reiterating that "[n]otions of economy of the estate in fixing fees are outdated and have no place in a bankruptcy code," and stated that "bankruptcy legal services are entitled to command the same competency of counsel as other cases."[49]

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[46] H.R. REP. NO. 595, at 329-30 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6286.

[47] *Id.*; *see also id.* (without fee parity, "[b]ankruptcy specialists, who enable the system to operate smoothly, efficiently, and expeditiously, would be driven elsewhere, and the bankruptcy field would be occupied by those who could not find other work and those who practice bankruptcy law only occasionally almost as a public service").

[48] 405 F.2d 429, 432 (5th Cir. 1968).

[49] 124 CONG. REC. H11,091-92 (daily ed. Sept. 28, 1978).

The current version of Section 330 is even more explicit. It provides that when "determining the amount of reasonable compensation to be awarded , the court shall consider all relevant factors, including (F) *whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.*"[50]

IV. FEE DEFENSE FEES ARE AWARDED IN COMPARABLE NON-BANKRUPTCY CONTEXTS.

Congress has provided for fee awards in numerous federal statutes. When fee awards are contested in litigation under those statutes, courts have addressed fees incurred in defending those fee awards on multiple occasions. Those cases set the standard of fees for comparable non-bankruptcy professional services as required by Section 330(a)(3)(F).

As explained in *In re Nucorp Energy, Inc.*, "[a]ttorneys' fees in bankruptcy cases are in the most important respect similar to attorneys' fees in other statutory cases. As in the case of other statutory fees, fees are awarded to bankruptcy counsel pursuant to

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[50] 11 U.S.C. § 330(a)(3)(F); Bankruptcy Reform Act of 1994, § 224(b), Pub. L. No. 103-394 (Oct. 22, 1994) (emphasis added); *see* Stephen J. Lubben, *What We "Know" About Chapter 11 Cost Is Wrong*, 17 FORDHAM J. OF CORP. & FINANCIAL LAW 141 (2012) (analysis of the context of chapter 11 reorganization professional fees and actual cost of reorganization in absolute terms).

Congress' express directive that attorneys are to receive reasonable compensation for all services rendered in the course of their representation."[51]

This Court held in *Commissioner, I.N.S. v. Jean* that courts may award fees under the Equal Access to Justice Act for fees incurred in litigating a fee request without additionally proving a fee request objection was not substantially justified.[52] The reasoning is apt:

> Any given civil action can have numerous phases. While the parties' postures on individual matters may be more or less justified, the EAJA – like other fee-shifting statutes – favors treating a case as an inclusive whole, rather than as atomized line-items. *See, e.g., Sullivan* v. *Hudson*, 490 U.S. 877, 888 (1989) (where administrative proceedings are "necessary to the attainment of the results Congress sought to promote by providing for fees, they should be considered part and parcel of the action for which fees may be awarded"). *Cf. Gagne* v. *Maher*, 594 F.2d 336, 344 (CA2 1979) ("[D]enying attorneys' fees for time spent in obtaining them would 'dilute the value of a fees award by forcing attorneys into extensive uncompensated litigation in order to gain any fees'" under 42 U.S.C. § 1988), *aff'd on other grounds*, 448 U.S. 122 (1980); *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 559

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[51] 764 F.2d 655, 662 (9th Cir. 1985).

[52] 496 U.S. 154, 165-66 (1990).

(1986) (fees for postjudgment proceedings to enforce consent decree properly compensable as a cost litigation under § 304(d) of the Clean Air Act); *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54 (1980) (fees for administrative proceedings included under § 706(k) of Title VII of the Civil Rights Act of 1964).[53]

Fee defense fees are routinely awarded in cases arising under the Civil Rights Attorney's Fees Awards Act (including an affirmance by this Court),[54] the Fair Housing Act,[55] Title VII,[56] labor

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[53] 496 U.S. at 161-62.

[54] 42 U.S.C. § 1988; *see, e.g.*, *Hutto v. Finney*, 437 U.S. 678, 693, 700 (1978) (appellate fee award for defending challenge to fee award against state agency); *Johnson v. Mississippi*, 606 F.2d 635, 637-38 (5th Cir. 1979); *Bagby v. Beal*, 606 F.2d 411, 415-16 (3d Cir. 1979); *Gagne v. Maher*, 594 F.2d 336, 344 (2d Cir. 1979), *aff'd*, 448 U.S. 122 (1980); *see also Porzig v. Dresdner, Kleinwort, Benson, N. Am., LLC*, 497 F.3d 133, 143-44 (2d Cir. 2007) (also Age Discrimination in Employment Act, 29 U.S.C. § 626).

[55] *E.g.*, *Hairston v. R & R Apartments*, 510 F.2d 1090 (7th Cir. 1975) (remanding for fee defense fees under 42 U.S.C. § 3612(p) (formerly cited as 42 U.S.C. § 3612(c))).

[56] *Prandini v. Nat'l Tea Co.*, 585 F.2d 47, 53-54 (3d Cir. 1978) (collecting cases holding that fees for time spent on fee applications "and successful fee appeals" may be awarded). Title VII jurisprudence is especially persuasive because bankruptcy courts regularly apply the reasonableness factors for a fee award set forth in a Title VII case, *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717 (5th Cir. 1974); *see, e.g.*, *In re Pilgrim's Pride Corp.*, 690 F.3d 650, 656 (5th Cir. 2012) ("Following the Bankruptcy Code's enactment, we made clear that the lodestar, *Johnson* factors, and § 330 coalesced to form the

(Continued on following page)

statutes,[57] and many other federal statutes.[58] *See also Nucorp*, 764 F.2d at 660 (discussing cases).

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framework that regulates the compensation of professionals employed by the bankruptcy estate.").

[57] *E.g., Fegley v. Higgins*, 19 F.3d 1126, 1135 (6th Cir. 1994) (Fair Labor Standards Act case, 29 U.S.C. § 216(b), noting on remand that it would "leave it to the discretion of the district court as to whether to increase the previous award of .. attorney fees" in light of the fact that the plaintiff's attorney "expended additional effort upon this appeal"); *Pawlak v. Greenawalt*, 713 F.2d 972, 981-84 (3d Cir. 1983) (Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 401-531, approving fees incurred in fee litigation from union treasury for enforcing statutory rights and thereby conferring common benefit).

[58] *Davis v. Bd. of Sch. Comm'rs*, 526 F.2d 865, 868 (5th Cir. 1976) (Emergency School Aid Act of 1972, § 718, 20 U.S.C. § 1617 (*repealed by* Pub. L. No. 95-561, Title VI, § 601(b)(2), 92 Stat. 2268 (1978)); *Torres v. Sachs*, 69 F.R.D. 343, 348 n.5 (S.D.N.Y. 1975) (Voting Rights Act, 52 U.S.C. § 10310 (formerly cited as 42 U.S.C. § 1973(e))); *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 981 (9th Cir. 2008) (Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(a)(3)); *Ziegler Coal Co. v. Dir., Office of Workers' Comp. Programs*, 326 F.3d 894, 903 (7th Cir. 2003) (Longshore and Harbor Workers' Compensation Act, § 928, 33 U.S.C. § 928); *Gonter v. Hunt Valve Co.*, 510 F.3d 610, 620-21 (6th Cir. 2007) (False Claims Act, 31 U.S.C. § 3730); *Pub. Interest Research Group of N.J., Inc. v. Windall*, 51 F.3d 1179, 1190 (3d Cir. 1995) (Clean Water Act, 33 U.S.C. § 1365(d)); *Auto Alliance Int'l, Inc. v. U.S. Customs Serv.*, 155 Fed. App'x 226, 229 (6th Cir. 2005) (Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E)(i)); *Saldivar v. Rodela*, 894 F. Supp. 2d 916, 939 (W.D. Tex. 2012) (International Child Abduction Remedies Act, 22 U.S.C. § 9007(b)(3) (formerly cited as 42 U.S.C. § 11607(b)(3))); *Bd. of Trs. of Hotel & Rest. Emps. Local 25 v. JPR, Inc.*, 136 F.3d 794, 808 (D.C. Cir. 1998) (Employee Retirement Income Security Act, 29 U.S.C. § 1132(g)(2)(D)).

The rationale for awarding fees for fee defenses in these non-bankruptcy settings is consistent with Congress's intention that fee awards in bankruptcy cases be at full market rates in order to attract competent specialist professionals into the bankruptcy field. Failing to award fees for fee defense requires the applicant to bear the cost of defending its awards from meritless objections without any further compensation. "If an attorney is required to expend time litigating his fee claim, yet may not be compensated for that time, the attorney's effective rate for all the hours expended on the case will be correspondingly decreased. Recognizing this fact, attorneys may become wary about taking Title VII cases, civil rights cases, or other cases for which attorneys' fees are statutorily authorized."[59]

For bankruptcy fee allowances to be truly comparable to the compensation earned by lawyers billing their private clients at fair market rates in other commercial matters, fee applicants must be compensated, not only for the incremental cost of preparing elaborate fee applications not required in non-bankruptcy matters, but also for the successful defense of the awards in respect of such applications. In other commercial settings, third parties have no opportunity to object to the fees earned by the lawyer under the lawyer's retention agreement. The court must compensate the bankruptcy estate professional

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[59] *Prandini*, 585 F.2d at 53; *see Nucorp*, 764 F.2d at 661.

for defending a fee award to ensure truly comparable fees.

Congress's intention to allow full market compensation for bankruptcy professionals, rather than maintain the dysfunctional principle of economy that imposed below-market compensation, is fully accomplished only when the supervising court can consider the facts and determine in its discretion whether a fee award for all the work in the case – including defending a fee application – is reasonable and necessary. Indeed the case for allowance of full compensation for successful fee defense is at its most compelling when, as here, creditors were paid in full under a hard-fought but highly successful confirmed plan, yet a disgruntled shareholder proffered numerous meritless objections to the allowance of the professional fees that achieved that remarkably successful result.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

BAKER BOTTS L.L.P. AND
JORDAN, HYDEN, WOMBLE, CULBRETH & HOLZER, P.C.,

Petitioners,

v.

ASARCO LLC,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE COMMITTEE ON BANKRUPTCY AND CORPORATE REORGANIZATION OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, THE BUSINESS LAW SECTION OF THE FLORIDA BAR, THE BANKRUPTCY LAW SECTION OF THE LOUISIANA STATE BAR ASSOCIATION, AND THE BANKRUPTCY LAW SECTION OF THE BEVERLY HILLS BAR ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 4

ARGUMENT 6

The Bankruptcy Code Gives Bankruptcy Courts Discretion To Award Professional Fees Incurred In The Defense Of A Fee Application. 6

CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

Cases

Boyd v. Engman,
404 B.R. 467 (W.D. Mich. 2009) 10

Cellular Telecomms. & Internet Ass'n v. FCC,
330 F.3d 502 (D.C. Cir. 2003) 7

Chambers v. NASCO, Inc.,
501 U.S. 32 (1991) 12

In re Babcock & Wilcox Co.,
526 F.3d 824 (5th Cir. 2008) (*per curiam*) 14

In re Riverside-Linden Inv. Co.,
945 F.2d 320 (9th Cir. 1991) 14

In re Smith,
317 F.3d 918 (9th Cir. 2002) 4, 9

In re Worldwide Direct, Inc.,
334 B.R. 108 (D. Del. 2005) 7

McCulloch v. Maryland,
17 U.S. (4 Wheat.) 316 (1819) 7

Mennella v. Kurt E. Schon E.A.I., Ltd.,
979 F.2d 357 (5th Cir. 1992) 12

United States v. Comstock,
560 U.S. 126 (2010) 7

Statutes and Rules

11 U.S.C. § 327 6

11 U.S.C. § 1103 6

11 U.S.C. § 330 4

11 U.S.C. § 330(a)(1) 6, 9

11 U.S.C. § 330(a)(3)(C) 7

11 U.S.C. § 330(a)(3)(F) 13

11 U.S.C. § 330(a)(4)(A) 8

11 U.S.C. § 330(a)(6) 7, 8

17 U.S.C. § 505 11

35 U.S.C. § 285 11

42 U.S.C. § 1988 11

42 U.S.C. § 2000e-5(k) 11

Fed. R. Bankr. P. 2016 9

Other Authorities

Chapter 11 Operating Guidelines & Reporting Requirements of the U.S. Trustee, Region 5, Judicial Districts of Louisiana and Mississippi, *available at* http://www.justice.gov/ust/r05/docs/general/guidelines/ogrr11.pdf (last visited Dec. 9, 2014) 9

Collier on Bankruptcy (16th ed. 2014) 14

Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under 11 U.S.C. 330 by Attorneys in Larger Chapter 11 Cases, 78 Fed. Reg. 36248 (June 17, 2013) 13

Southern District of Texas Guidelines for Compensation & Expense Reimbursement of Professionals in Complex Chapter 11 Cases, *available at* http://www.txs.uscourts.gov/bankruptcy/rulesforms proc/tx_ch11_comp_rules.pdf (last visited Dec. 9, 2014) 9

The Committee on Bankruptcy and Corporate Reorganization of the Association of the Bar of the City of New York, the Business Law Section of The Florida Bar, the Bankruptcy Law Section of the Louisiana State Bar Association, and the Bankruptcy Law Section of the Beverly Hills Bar Association respectfully submit this brief as *amici curiae* in support of petitioners.[1]

INTEREST OF *AMICI CURIAE*

The Association of the Bar of the City of New York, founded in 1870, is a voluntary association of more than 23,000 lawyers and law students. Its purposes include cultivating the science of jurisprudence, promoting reforms in the law, facilitating and improving the administration of justice, and elevating the standard of integrity, honor, and courtesy in the legal profession. The Association has 150 committees that focus on different legal practice areas and issues. Among these is the Committee on Bankruptcy and Corporate Reorganization, which focuses on issues relevant to corporate and individual bankruptcies and corporate restructurings. Committee members include lawyers who represent both debtors and creditors in corporate and individual bankruptcies,

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[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici*, their members, or counsel made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to this Court's Rule 37.3, the parties in this case have consented to the filing of this brief. Petitioners filed a blanket consent to the filing of all *amicus curiae* briefs on October 8, 2014, and respondent's consent letter is filed along with this brief.

as well as scholars and financial advisors. Among other functions, the Committee engages on issues relevant to the development of bankruptcy law through judicial decisions and legislation. This brief was approved by the Committee and by the President of the New York City Bar Association.

The Business Law Section of The Florida Bar is a voluntary organization within The Florida Bar for members interested in corporate law, banking, business, bankruptcy, computer and cyber law, antitrust and franchise law, litigation, and related areas of law. Its purpose is to provide a forum for the discussion and exchange of ideas leading to the improvement of the laws relating to these areas. The Business Law Section has filed *amicus* briefs with this Court, the United States Courts of Appeals, and the Florida Supreme Court in cases involving bankruptcy-related issues. The Business Law Section also actively participates in legislative initiatives contemplating amendments to the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and applicable Florida statutes. The Business Law Section thus has a strong interest in the proper interpretation and administration of the Bankruptcy Code.[2]

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[2] This brief was reviewed by the Executive Committee of the Board of Governors of The Florida Bar on December 8, 2014, consistent with applicable standing board policies. It is tendered solely by the Business Law Section and supported by the separate resources of this voluntary organization—not in the name of The Florida Bar, and without implicating the mandatory membership fees paid by any Florida Bar licensee.

The Bankruptcy Law Section of the Louisiana State Bar Association ("LSBA") is a voluntary section of lawyers who practice in this field. The Section seeks to encourage and foster (1) discussions and studies and the dissemination of information relating to bankruptcy law; (2) continuing education relating to developments in this field; (3) the study of possible improvements in this field; (4) interest, activity, and research in this field; and (5) cooperation with relevant Sections of the American Bar Association. In particular, the Bankruptcy Law Section of the LSBA has a strong interest in making sure that the Bankruptcy Code is properly and consistently interpreted.[3]

The Beverly Hills Bar Association (BHBA) is a voluntary bar association with more than 5,600 members who live or work on the west side of Los Angeles County, California. BHBA is dedicated to improving the administration of justice, meeting the professional needs of Los Angeles lawyers, and serving the public. BHBA is located within the Central District of California, which has the largest volume of bankruptcy cases in the country.

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[3] This position is being presented only on behalf of the Bankruptcy Law Section of the LSBA. This position should not be construed as representing the position of the Board of Governors, the Executive Committee, or the General Membership of the LSBA. The Bankruptcy Law Section which takes this position is a voluntary section of 159 members composed of lawyers practicing in a specified area of law. This position is taken as the result of a vote of 3 to 0 of the Executive Committee of the Bankruptcy Law Section, which is the governing body of that section. No approval or disapproval of the General Membership of the Section has been obtained.

Accordingly, BHBA has an active Bankruptcy Law Section whose members include a broad range of bankruptcy practitioners, including attorneys, judges, scholars, and advisors representing debtors, creditors, trustees, committees and other parties in interest in bankruptcy cases large and small. The Section serves as an educational resource for practitioners and as an advocate for their causes. Its members are interested in the interpretation of the Bankruptcy Code and, as practitioners in the Ninth Circuit, are particularly interested in upholding *In re Smith*, 317 F.3d 918 (9th Cir. 2002), which properly places the award of fees for the defense of fee applications within the bankruptcy court's sound discretion.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the decision below, the Fifth Circuit announced a bright-line rule that the Bankruptcy Code gives judges *no* discretion to award professional fees incurred in the defense of an application for professional fees. According to the Fifth Circuit, such fees are never "necessary" to the administration of a bankruptcy case because "[t]he primary beneficiary of a professional fee application, of course, is the professional." Pet. App. 15a. But the relevant statute, 11 U.S.C. § 330, plainly recognizes that providing appropriate compensation for covered professionals furthers the fair and equitable resolution of a bankruptcy case, which is why the statute authorizes appropriate compensation for covered professionals in the first place.

The term "necessary" in the relevant Bankruptcy Code provisions, thus, is not amenable to a bright-line interpretation that categorically includes or

excludes fees incurred in defense of a professional fee application. Whether such fees are warranted in any particular case is a question assigned in the first instance to the bankruptcy court, and thereafter subject to review for abuse of discretion.

The Fifth Circuit's contrary rule categorically deeming fees for the defense of a fee application "unnecessary" to the administration of a bankruptcy case creates a perverse incentive for abuse. It is hard to imagine a court ever awarding such fees insofar as a challenge to a fee application has succeeded. Therefore, almost by definition, the question is whether a bankruptcy court can award such fees insofar as a challenge to a fee application has failed. If courts lack such power, there is nothing to prevent interested (and often adverse) parties from forcing professionals to incur substantial fees to defend against meritless challenges to a fee application, and thereby to dilute their fees. While the statute does not *require* bankruptcy courts to award fees incurred in defending fee applications, it certainly *allows* bankruptcy courts to award such fees as warranted in particular cases.

The bankruptcy process is a unique hybrid of litigation and negotiation. Parties bring claims against each other, but also try to resolve their differences consensually. The Bankruptcy Code relies upon the adversarial process to reconcile the parties' conflicting interests, which is why the Bankruptcy Code authorizes compensation from the estate not only for the debtor's counsel, but also for counsel for official committees of creditors (as well as other professionals). Sometimes, as this case illustrates, the adversarial process can result in

animosity. The Fifth Circuit's atextual bright-line rule allows adverse parties to use the explicit or implicit threat of a challenge to a professional fee application to distort the process. In particular, that rule makes it easier for interested parties to mount strategic challenges to professional fees in an attempt to drive a wedge between the interests of professionals and their clients, or to discourage professionals from representing their clients in the first place. To avoid such abuse, it was eminently sensible for Congress to vest bankruptcy courts with discretion to award fees for the defense of fee applications in appropriate circumstances. Because the decision below strips the courts of such discretion, this Court should reverse the judgment.

ARGUMENT

The Bankruptcy Code Gives Bankruptcy Courts Discretion To Award Professional Fees Incurred In The Defense Of A Fee Application.

The Bankruptcy Code specifically authorizes bankruptcy courts to award professionals (including attorneys) "reasonable compensation for actual, *necessary* services rendered" from the assets of the estate. 11 U.S.C. § 330(a)(1) (emphasis added). That authorization extends to professionals "employed under section 327 or 1103," *id.*—*i.e.*, not merely professionals who serve the debtor or trustee (section 327), but also professionals who serve official creditors' committees (section 1103).

The key textual question, then, involves the meaning of the word "necessary." The Fifth Circuit held that professional fees incurred in defense of an application for professional fees can *never* be deemed "necessary" to the administration of a case, based on

the theory that such fees categorically do not benefit "the debtor's estate or its administration" because "the debtor's estate, and therefore normally the creditors, bear the cost." Pet. App. 15a. That theory reflects a misunderstanding of statutory text and structure as well as the bankruptcy process, with grave consequences for the clients represented by professionals in bankruptcy cases.

The term "necessary," here as elsewhere in the law, does not mean absolutely or metaphysically essential. *Cf. United States v. Comstock*, 560 U.S. 126, 133-34 (2010) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413-15 (1819)); *Cellular Telecomms. & Internet Ass'n v. FCC*, 330 F.3d 502, 510 (D.C. Cir. 2003). Indeed, the statute underscores this point by specifically authorizing compensation for professional services that were "beneficial" to the completion of a bankruptcy case, 11 U.S.C. § 330(a)(3)(C), including compensation for the preparation of a professional fee application, *see id.* § 330(a)(6).

Congress thus clearly understood that reasonable compensation for professionals is "necessary" to the fair and equitable resolution of a bankruptcy case, even though (as the Fifth Circuit pointed out) "the debtor's estate, and therefore normally the creditors, bear the cost" of such compensation. Pet. App. 15a. The fact that an award of fees benefits the professional does not mean that it does not *also* benefit the professional's client or the bankruptcy process as a whole. *See, e.g., In re Worldwide Direct, Inc.*, 334 B.R. 108, 111 (D. Del. 2005). Indeed, as noted above, the statute necessarily recognizes that professionals promote the fair and equitable resolution of bankruptcy cases because the statute

allows such professionals to be reasonably compensated from the bankruptcy estate's assets in the first place. The statute does not exclude any substantive category of fees (such as fees incurred in the preparation or defense of a fee application). Rather, the statute excludes *only* compensation for "unnecessary duplication of services," services that were not "reasonably likely to benefit the debtor's estate," and services that were not "necessary to the administration of the case." 11 U.S.C. § 330(a)(4)(A).

There is simply no basis in the statute for the Fifth Circuit's bright-line rule that a bankruptcy court may never award compensation for fees incurred in the defense of a fee application. Indeed, such fees are materially indistinguishable from "compensation awarded for the preparation of a fee application," which the statute expressly contemplates. 11 U.S.C. § 330(a)(6). Contrary to the Fifth Circuit's suggestion, *see* Pet. App. 15-16a, the fact that the statute addresses the latter does not mean that it does not encompass the former. Subsection (a)(6) does not purport to *authorize* compensation for the preparation of a fee application; rather, it simply specifies that such compensation "shall be based on the level and skill reasonably required to prepare the application." 11 U.S.C. § 330(a)(6). Such compensation, like all other professional compensation, is authorized by subsection (a)(1), which, as noted above, refers only to "reasonable compensation for actual, necessary services rendered" by a professional. Compensation for the *defense* of a fee application, like compensation for the *preparation* of a fee application, readily falls within that authorization because it promotes the fair and equitable resolution of a bankruptcy case.

Such compensation encourages competent professionals to represent debtors and official committees, and prevents their fees from dilution as a result of the unusually transparent and deliberately cumbersome fee application process. *See, e.g.*, *Smith*, 317 F.3d at 928.

A modern bankruptcy fee application, after all, is the antithesis of the old-school one-line legal bill "for services rendered." This is not a private matter between an attorney and a client, but rather a public document subject not only to court approval but also to challenge by a range of interested—and potentially adverse—parties. *See* 11 U.S.C. § 330(a)(1) (requiring notice of the application to the United States Trustee and other interested parties). As the Fifth Circuit noted, "bankruptcy rules require professionals to justify their fee applications with detailed, itemized billing records." Pet. App. 17a (citing, *inter alia*, Fed. R. Bankr. P. 2016). Bankruptcy courts across the country have established different, but equally rigorous, guidelines governing fee applications. *See, e.g.*, Southern District of Texas Guidelines for Compensation & Expense Reimbursement of Professionals in Complex Chapter 11 Cases, *available at* http://www.txs.uscourts.gov/bankruptcy/rulesformsproc/tx_ch11_comp_rules.pdf (last visited Dec. 9, 2014). In addition, the various regional offices of the United States Trustee have established detailed operating and reporting requirements. *See, e.g.*, Chapter 11 Operating Guidelines & Reporting Requirements of the U.S. Trustee, Region 5, Judicial Districts of Louisiana and Mississippi, *available at* http://www.justice.gov/ust/r05/docs/general/guidelines/ogrr11.pdf (last visited Dec. 9, 2014). For better or

worse, "[p]reparing and defending attorney fee applications is part and parcel with the attorney's role in the administration of the bankruptcy process." *Boyd v. Engman*, 404 B.R. 467, 483 (W.D. Mich. 2009).

The grounds for objecting to a professional fee application, if an interested party is inclined to do so, are virtually limitless. The handling of a case, after all, entails a series of substantive judgment calls. Was it necessary to send two attorneys, instead of one, to cover a hearing? Was it necessary to spend five hours, instead of one or two, researching a particular State's fraudulent transfer law? Was it necessary to look into a particular legal theory that ultimately did not make its way into the pleadings? Pet. App. 121-23a. Could a task performed by a senior associate have been performed by a junior associate? Pet. App. 130a. There is no "right" or "wrong" answer to any of these questions; they all involve the exercise of sound professional judgment, which is inherently subject to second-guessing.

Similarly, the mechanics of professional billing are subject to a virtually limitless array of challenges. Courts typically recognize, as did the bankruptcy court below, that they must not "impose slavish and over burdensome record-keeping requirements which, in the final analysis, result in fee applications of such enormous length and detail that they are of little ultimate value to the Court in awarding fees." Pet. App. 108-09a (internal quotation omitted). But how much detail is too much? The answer to that question is often in the eye of the beholder. And that is merely one of many potential questions involving the mechanics of billing. As this case shows, other potential questions

include the extent—if any—to which a bill should be reduced to account for attorney turnover, and whether it is appropriate to bill for the time of summer associates. *See* Pet. App. 112-14a, 130a. Again, all of these matters are inherently subject to second-guessing.

If an interested party wants to challenge a fee application, in other words, there will be no shortage of grounds on which to do so. And, as this case underscores, such challenges—even if ultimately deemed meritless—can force the professional to devote considerable resources to the defense of the application, thereby diluting the professional's fees. Such dilution may be perfectly appropriate if the requested fees are unwarranted, but the possibility of such dilution may also lead to abuse.

In our adversarial system, it is anomalous to give an adverse party the opportunity to review and challenge a professional's fees. Outside the context of the bankruptcy statute and a limited number of fee-shifting statutes, *see, e.g.*, 17 U.S.C. § 505; 35 U.S.C. § 285; 42 U.S.C. § 1988; 42 U.S.C. § 2000e-5(k), an attorney's fees are generally not subject to an opposing party's review and challenge, and one can only imagine the disputes that would ensue if they were. And this anomalous regime creates opportunities for abuse. At the very least, the fee application process gives adverse parties a weapon to try to drive a wedge between the interests of professionals and those of their clients, or to discourage professionals from representing their clients in the first place. Counsel for the debtor or an official committee must often take aggressive action to marshal the estate's assets—for example (as this case illustrates), filing a fraudulent transfer claim

against a major creditor. *See* Pet. App. 3a. Needless to say, such aggressive action is generally unwelcome to its targets, and it is neither unexpected nor unknown for them to respond by challenging professional fees, or threatening—implicitly or explicitly—to do so. Giving bankruptcy courts discretion to award fees for the defense of fee applications in appropriate circumstances ensures that the prospect of challenges to fee applications will not distort the adversarial process, and thus provides a valuable check on the exceptional power of interested parties in bankruptcy to review and challenge the fees of professionals representing other parties.

The Fifth Circuit sought to address this concern by declaring that "[w]e are confident that bankruptcy courts, practicing vigilance and sound case management, can thwart punitive or excessively costly attacks on professional fee applications." Pet. App. 21a. Such "confiden[ce]," however, is misplaced. The "vigilance and sound case management" invoked by the Fifth Circuit boils down to a court's authority to sanction litigants for "bad faith" conduct. *Id.* (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991)). But establishing "bad faith" is never an easy task, and is especially difficult in this context, given that there is nothing inherently wrong with raising a multiplicity of objections to a professional fee application. Even where such objections are meritless, that hardly means that they are sanctionable. *See, e.g.*, *Mennella v. Kurt E. Schon E.A.I., Ltd.*, 979 F.2d 357, 365 (5th Cir. 1992) (distinguishing between "meritless" and "sanctionable" positions).

Nor is it any answer to assert, as did the Fifth Circuit, that professionals can address the threat of fee dilution by "anticipat[ing] this possibility in their hourly rates." Pet. App. 18a n.7. Hourly rates in bankruptcy cases are typically established at the outset of a representation, and there is simply no way to factor in the expense of a subsequent defense against challenges to fee applications as a "cost of doing business." And hourly rates in bankruptcy are typically set by reference to the rates of non-bankruptcy practitioners, which do not include any comparable component to reflect the defense of a fee application. *See, e.g.*, 11 U.S.C. § 330(a)(3)(F) (court reviewing professional fee application must consider "whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than under this title"). Indeed, the United States Trustee has promulgated fee guidelines that require disclosure of a professional's comparable rates in non-bankruptcy engagements, and verification that the client has sought to ensure that the billing rates are comparable to non-bankruptcy engagements. *See* Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under 11 U.S.C. 330 by Attorneys in Larger Chapter 11 Cases, 78 Fed. Reg. 36248 (June 17, 2013). It would be an odd system indeed that allowed professionals to be compensated for defending fee applications indirectly through their hourly rates instead of directly through compensation for reasonable actual defense fees.

The decision below thus gets matters precisely backwards when it asserts that "[t]he perverse incentives that could arise from paying the

bankruptcy professionals to engage in satellite fee litigation are easy to conceive." Pet. App. 18a. Allowing professionals to recover fees incurred in defense of fee applications creates no incentive "to engage in satellite fee litigation" because professionals have no assurance that they will be awarded such fees (and indeed are highly unlikely to be awarded such fees insofar as the challenges to the fee application are meritorious). *See, e.g.*, *In re Riverside-Linden Inv. Co.*, 945 F.2d 320, 323 (9th Cir. 1991). Rather, the only perverse incentives here are created by the Fifth Circuit's rule that fees incurred in defense of fee applications are *never* compensable, a blanket rule that raises the prospect that adversaries will—implicitly or explicitly—use the threat of fee litigation to distort the adversarial process.

The Fifth Circuit's decision also undermines the touchstone of parity between professional fees in bankruptcy cases and non-bankruptcy cases. In overhauling the Bankruptcy Code in 1978, Congress specifically abandoned the prior "economy of the estate" rule in favor of parity in compensation between bankruptcy and non-bankruptcy practitioners to ensure that debtors had access to skilled counsel. *See, e.g.*, *In re Babcock & Wilcox Co.*, 526 F.3d 824, 827 (5th Cir. 2008) (*per curiam*) ("Prior to being amended in 1978, this statute favored economy of the estate over competitive compensation to attorneys for the debtors.") (internal quotation omitted); 3 *Collier on Bankruptcy* ¶ 330.03[3] (16th ed. 2014) ("The economy factor was abandoned under the Bankruptcy Code in favor of the new policy that attorneys engaged in bankruptcy cases should receive compensation in parity with that received by

attorneys performing services in comparable situations."). The decision below threatens an effective reduction in rates of retained professionals in proportion to their efforts in defending their fees. And such dilution can be a particular concern in smaller cases: the more modest the underlying fees requested in the application, the more likely the defense against an abusive challenge to render the entire representation uneconomical. Parity promotes the adversarial process in bankruptcy cases, and that process in turn promotes the overall efficiency and fairness of the bankruptcy system.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment.

December 10, 2014

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Supreme Court of the United States

BAKER BOTTS L.L.P. ET AL.,

PETITIONERS,

v.

ASARCO LLC,

RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR FORMER BANKRUPTCY JUDGES LEIF M. CLARK AND JUDITH K. FITZGERALD AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. Section 330(a) Directs The Bankruptcy Court To Scrutinize A Professional's Fee Application And To Award Reasonable Fees. 4

II. Section 330(a) Grants The Bankruptcy Court Broad Discretion To Avoid Fee Dilution. 7

III. The Decision Below Prevents The Bankruptcy Court From Carrying Out Section 330(a)'s Commands. 11

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Anderson v. Anderson
(In re Anderson),
936 F.2d 199 (5th Cir. 1991) (per curiam) 6

Boldt v. Crake
(In re Riverside-Linden Inv. Co.),
945 F.2d 320 (9th Cir. 1991) 10

Boyd v. Engman,
404 B.R. 467 (W.D. Mich. 2009) 7

Brake v. Tavormina
(In re Beverly Mfg. Corp.),
841 F.2d 365 (11th Cir. 1988) 5

Cent. Trust Co. v. Wabash, St. L. & P. Ry. Co.,
32 F. 187 (C.C.E.D. Mo. 1887) 8

Chambers v. NASCO, Inc.,
501 U.S. 32 (1991) 13

Comm'r v. Jean,
496 U.S. 154 (1990) 10, 12

Gagne v. Maher,
594 F.2d 336 (2d Cir. 1979) 10

Hennigan Bennett & Dorman LLP v.
Goldin Assocs. L.L.C.
(In re Worldwide Direct Inc.),
334 B.R. 108 (D. Del. 2005) 7

Hensley v. Eckerhart,
461 U.S. 424 (1983) 9, 10

In re AGE Refining, Inc.,
447 B.R. 786 (Bankr. W.D. Tex. 2011) 3

In re Baker,
374 B.R. 489 (Bankr. E.D.N.Y. 2007) 5

In re Balderas,
328 B.R. 707 (Bankr. W.D. Tex. 2005) 3

In re Busy Beaver Bldg. Ctrs., Inc.,
19 F.3d 833 (3d Cir. 1994) 14

In re Chapman Farms,
58 B.R. 822 (Bankr. W.D. Wisc. 1986) 5

In re Commercial Fin. Servs., Inc.,
427 F.3d 804 (10th Cir. 2005) 6

In re El Paso Refinery, L.P.,
257 B.R. 809 (Bankr. W.D. Tex. 2000) 3

In re Farah,
141 B.R. 920 (Bankr. W.D. Tex. 1992) 3

In re Fibermark, Inc.,
349 B.R. 385 (Bankr. D. Vt. 2006) 8

In re Fleming Cos.,
304 B.R. 85 (Bankr. D. Del. 2003) 12

In re Geneva Steel Co.,
258 B.R. 799 (Bankr. D. Utah 2001) 10

In re Gilbert,
276 U.S. 294 (1928) 4

In re Int'l Coins & Currency, Inc.,
22 B.R. 127 (Bankr. D. Vt. 1982) 1

In re Intelogic Trace, Inc.,
188 B.R. 557 (Bankr. W.D. Tex. 1995) 3

In re Kahuku Hosp.,
No. 07-176, 2011 WL 5884144
(Bankr. D. Haw. Nov. 23, 2011) 10

In re Martin,
817 F.2d 175 (1st Cir. 1987) 6

In re Millennium Multiple Emp'r Welfare Benefit Plan,
470 B.R. 203 (Bankr. W.D. Okla. 2012) 10

In re Nucorp Energy, Inc.,
764 F.2d 655 (9th Cir. 1985) 7

In re Quigley Co.,
500 B.R. 347 (Bankr. S.D.N.Y. 2013) 10

In re S. Cal. Sunbelt Developers, Inc.,
608 F.3d 456 (9th Cir. 2010) 12

In re S.T.N. Enters., Inc.,
70 B.R. 823 (Bankr. D. Vt. 1987) 5

In re Saunders,
124 B.R. 234 (Bankr. W.D. Tex. 1991) 3

In re Temple Ret. Cmty., Inc.,
97 B.R. 333 (Bankr. W.D. Tex. 1989) 2

Jacobowitz v. Double Seven Corp.,
378 F.2d 405 (9th Cir. 1967) 8

Jama v. Immigration & Customs Enforcement,
543 U.S. 335 (2005) 9

Pierson & Gaylen v. Creel & Atwood (In re Consol. Bancshares, Inc.),
785 F.2d 1249 (5th Cir. 1986) 12

Prappas & Eidman v. Smith (In re Mira-Pak, Inc.),
922 F.2d 214 (5th Cir. 1991) (per curiam) 10

Rose Pass Mines, Inc. v. Howard,
615 F.2d 1088 (5th Cir. 1980) (per curiam) 7

Santa Fe Minerals, Inc. v. BEPCO, L.P.
(In re 15375 Mem'l Corp.),
430 B.R. 142 (Bankr. D. Del. 2010) 13

Smith v. Edwards & Hale, Ltd.
(In re Smith),
317 F.3d 918 (9th Cir. 2002) 7, 8, 9

Trustees v. Greenough,
105 U.S. 527 (1882) 9

Statutes

11 U.S.C. § 330 ..... passim

11 U.S.C. § 1109 5

28 U.S.C. § 158 6

28 U.S.C. § 586 5

28 U.S.C. § 1254 6

Rules & Regulations

28 C.F.R. pt. 58, app. A 12

FED. R. BANKR. P. 2016 5

FED. R. BANKR. P 9011 13

Other Authorities

Bermant, Gordon, et al.,
A Day in the Life: The Federal Judicial Center's 1988–1989 Bankruptcy Court Time Study,
65 AM. BANKR. L.J. 491 (1991) 1

H.R. REP. NO. 95-595 (1977) 7

INTEREST OF *AMICI CURIAE*[*]

Amici are former United States Bankruptcy Judges who have collectively devoted hundreds if not thousands of hours to reviewing fee applications. *See* Gordon Bermant et al., *A Day in the Life: The Federal Judicial Center's 1988–1989 Bankruptcy Court Time Study*, 65 AM. BANKR. L.J. 491, 513–14 (1991) (noting that a bankruptcy judge spends an estimated 61.9 hours per year on fee applications). Those hours inspire little nostalgia, as "the fixing of compensation for professionals [is] a difficult and unpleasant task." *In re Int'l Coins & Currency, Inc.*, 22 B.R. 127, 128 (Bankr. D. Vt. 1982). But as one of the *amici* has explained, that work calls for great care on the part of the bankruptcy judge:

> [C]ourt-appointed counsel are paid only upon application to the court. The money is transferred almost literally over the judge's signature on a court order approving the fees. The affixing of a judge's signature to an order is not an empty formality. It is a judicial confirmation that the fees in question are in fact reasonable and do in fact represent compensation for actual and necessary services, measured against the

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[*] Petitioners' letter giving blanket consent to *amicus* briefs, and respondent's written consent to this brief, are on file with the Clerk of Court. No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

> various factors set out in the case law. Because fees can be paid only upon court order, the court which signs that order must therefore be prepared to accept responsibility for its judicial actions by independently determining that court authorization for the fees is warranted.

In re Temple Ret. Cmty., Inc., 97 B.R. 333, 337 (Bankr. W.D. Tex. 1989) (citations omitted).

In this case, the Fifth Circuit constricted the discretionary authority of bankruptcy judges by holding that 11 U.S.C. § 330(a) "does not authorize compensation for the costs counsel or professionals bear to defend their fee applications." Pet. App. 14a. This surprising ban on "defense fees" threatens the smooth functioning of the bankruptcy courts by diluting the compensation that professionals can receive for services that are necessary and beneficial to the administration of a bankruptcy case. *See* 11 U.S.C. § 330(a)(1), (3), (4). In particular, the Fifth Circuit's misreading of Section 330(a) hinders a bankruptcy judge's ability to maintain the parity of fees that Congress deems essential to avoiding a brain drain in the bankruptcy field. *Amici* submit this brief in support of petitioners and urge the Court to reverse the decision below so that *amici's* judicial successors will be allowed to do the job that Congress has assigned.

The signatories to this brief are as follows:

Hon. Leif M. Clark. The Honorable Leif M. Clark was a United States Bankruptcy Judge for the Western District of Texas from 1987 to 2012. His

opinions on the subject of compensation under Section 330(a) include *In re Saunders*, 124 B.R. 234 (Bankr. W.D. Tex. 1991), *In re Farah*, 141 B.R. 920 (Bankr. W.D. Tex. 1992), *In re Intelogic Trace, Inc.*, 188 B.R. 557 (Bankr. W.D. Tex. 1995), *In re El Paso Refinery, L.P.*, 257 B.R. 809 (Bankr. W.D. Tex. 2000), *In re Balderas*, 328 B.R. 707 (Bankr. W.D. Tex. 2005), and *In re AGE Refining, Inc.*, 447 B.R. 786 (Bankr. W.D. Tex. 2011).

Hon. Judith K. Fitzgerald. The Honorable Judith K. Fitzgerald was a United States Bankruptcy Judge for the Western District of Pennsylvania from 1987 to 2013. She served as Chief Judge of that court for five years, and also presided over matters in the District of Delaware, the Eastern District of Pennsylvania, and the District of the Virgin Islands.

INTRODUCTION AND SUMMARY OF ARGUMENT

To ensure that a debtor's estate enjoys the benefit of assistance from talented professionals, Section 330(a) dictates that fees in bankruptcy cases may be awarded for "actual, necessary services" rendered by professionals that are beneficial to the administration of the bankruptcy case. *See* 11 U.S.C. § 330(a)(1), (3), (4). That statutory command grants bankruptcy judges broad discretion to ensure that professionals can recover reasonable compensation, which requires that their fees not be diluted relative to fees available in other cases. The application process for receiving compensation, which the Bankruptcy Code contemplates as an important part of administering a bankruptcy case, threatens fee dilution because it is demanding and onerous.

Section 330(a) gives bankruptcy judges discretionary authority to solve that problem by awarding defense fees. By administering the sweet with the bitter, bankruptcy judges can satisfy their obligation to avoid fee dilution and thus ensure that bankruptcy professionals are able to recover a reasonable fee for the essential services they perform.

ARGUMENT

I. Section 330(a) Directs The Bankruptcy Court To Scrutinize A Professional's Fee Application And To Award Reasonable Fees.

A bankruptcy judge must strike a balance when fixing a professional's reasonable compensation under Section 330(a). On the one hand, the Bankruptcy Code requires that he subject the professional to a demanding process for judging whether the fees she seeks should be paid out of the estate. On the other hand, he must take care not to unnecessarily impose bankruptcy-specific costs that would drive talent to other practice areas, harming debtors and interfering with the efficient administration of their estates.

Professionals whose fees are to be paid out of the bankruptcy estate under Section 330(a) must submit to an onerous process that helps the bankruptcy judge avoid "vicarious generosity" of the sort Chief Justice Taft condemned in *In re Gilbert*, 276 U.S. 294, 296 (1928). A professional begins by preparing "an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested."

FED. R. BANKR. P. 2016(a). As the Fifth Circuit correctly noted, this application must be supported by "ample documentation" and "detailed, itemized billing records [that] assure integrity and sharpen any potential disputes." Pet. App. 17a, 21a; *see also In re S.T.N. Enters., Inc.*, 70 B.R. 823, 835 (Bankr. D. Vt. 1987) (preparing application is "time-consuming and oppressive"). Lack of detail in the application jeopardizes the professional's entitlement to any payment at all. *See, e.g.*, *Brake v. Tavormina (In re Beverly Mfg. Corp.)*, 841 F.2d 365, 370 (11th Cir. 1988); *In re Baker*, 374 B.R. 489, 494 (Bankr. E.D.N.Y. 2007); *In re Chapman Farms*, 58 B.R. 822, 823–24 (Bankr. W.D. Wisc. 1986).

The professional's application is then opened to scrutiny and criticism before a wide audience that includes the bankruptcy judge, the United States Trustee, other trustees, the debtor, the creditors, and various committees. *See* 11 U.S.C. §§ 330(a)(1), 1109(b); FED. R. BANKR. P 2016(a). Any of these reviewers, including the bankruptcy judge on his own initiative, is entitled to object to the requested fee. *See* 11 U.S.C. § 330(a)(2); *cf.* 28 U.S.C. § 586(a)(3)(A) (authorizing United States Trustee to challenge fee applications). The objectors and the professional can then join issue over the application at a hearing. *See* 11 U.S.C. § 330(a)(1).

If the professional justifies her fee application, the bankruptcy judge "may award reasonable compensation for actual, necessary services rendered," 11 U.S.C. § 330(a)(1), reducing the award to account for any well-taken objections, *see id.* § 330(a)(2). The fee decision is subject to further

review by either the bankruptcy appellate panel or the district court, and still further review by the court of appeals and this Court. *See* 28 U.S.C. §§ 158, 1254(1). But because "[t]he bankruptcy judge is on the front line, in the best position to gauge the ongoing interplay of factors and to make the delicate judgment calls," *In re Martin*, 817 F.2d 175, 182–83 (1st Cir. 1987), he enjoys broad discretion in awarding compensation under Section 330(a). *See, e.g.*, *In re Commercial Fin. Servs., Inc.*, 427 F.3d 804, 810 (10th Cir. 2005); *Anderson v. Anderson (In re Anderson)*, 936 F.2d 199, 205 (5th Cir. 1991) (per curiam).

This process of seeking compensation under Section 330(a) is often arduous for the professional who works on a bankruptcy case, especially if a member of the gallery "mount[s] objections to extract a fee reduction." Pet. App. 139a. As Bankruptcy Judge Schmidt noted in this case:

> Bankruptcy involves a unique process whereby a lawyer who is compensated by the bankruptcy estate must publicly file his fee statements, and multiple parties are given the opportunity to object to those fees. A non-bankruptcy lawyer would not be subject either to the same level of scrutiny or to the same number of potential objectors.

Pet. App. 138a.

Bankruptcy-specific costs like these threaten to dilute the compensation that professionals receive relative to the fees recovered by professionals in other practice areas. *See In re Nucorp Energy, Inc.*,

764 F.2d 655, 658–59 (9th Cir. 1985); *Rose Pass Mines, Inc. v. Howard*, 615 F.2d 1088, 1093 (5th Cir. 1980) (per curiam). A diluted fee is not a reasonable fee. As a result, fee dilution threatens to drive away the "'bankruptcy specialists[] who enable the system to operate smoothly, efficiently, and expeditiously.'" *Boyd v. Engman*, 404 B.R. 467, 483 (W.D. Mich. 2009) (quoting H.R. REP. NO. 95-595, at 330 (1977)); *see also Smith v. Edwards & Hale, Ltd. (In re Smith)*, 317 F.3d 918, 928–29 (9th Cir. 2002); *Hennigan Bennett & Dorman LLP v. Goldin Assocs. L.L.C. (In re Worldwide Direct Inc.)*, 334 B.R. 108, 111–12 (D. Del. 2005); Pet. App. 135a–43a.

In recognition of this serious problem, Congress has instructed each bankruptcy judge to guard against fee dilution. Section 330(a)(3)(F) promotes parity of fees by commanding the bankruptcy judge to consider "the customary compensation charged by comparably skilled practitioners in" non-bankruptcy cases when "determining the amount of reasonable compensation." And Section 330(a)(6) calibrates the dilution-avoiding payment "for the preparation of a fee application," limiting the bankruptcy judge to an award "based on the level and skill reasonably required to prepare the application" so that bankruptcy professionals do not collect fees that they could not obtain from clients in other fields.

II. Section 330(a) Grants The Bankruptcy Court Broad Discretion To Avoid Fee Dilution.

Because the Bankruptcy Code establishes an onerous process for awarding fees, it falls to the bankruptcy judge to steer a safe course between

vicarious generosity and fee dilution in determining reasonable compensation under Section 330(a). *See Smith*, 317 F.3d at 928–29; *In re Fibermark, Inc.*, 349 B.R. 385, 395–96 (Bankr. D. Vt. 2006); *cf. Jacobowitz v. Double Seven Corp.*, 378 F.2d 405, 408 (9th Cir. 1967). In the words of then-Judge Brewer:

> We desire to see the officers and agents of the court well paid, in order that men of character and ability may be willing to accept the burdens and responsibilities of these trusts; but at the same time we may not forget that the property to be charged with these allowances is not ours .

Cent. Trust Co. v. Wabash, St. L. & P. Ry. Co., 32 F. 187, 188 (C.C.E.D. Mo. 1887). To satisfy the duty that Section 330(a) assigns, the bankruptcy judge must press each professional for enough information to assess her fee application and any objections, while taking care that the necessary costs of oversight do not discourage bankruptcy practice by diminishing the award of reasonable fees.

The bankruptcy judge is empowered to perform this delicate task by Section 330(a), which grants the judge "discretion to award compensation for the defense of a fee application." Pet. i; *cf.* 11 U.S.C. § 330(a)(1)(A) ("[T]he court *may* award reasonable compensation " (emphasis added)). When the bankruptcy judge awards defense fees to temper bankruptcy-specific oversight costs and thus avoid fee dilution, he is properly compensating the professional for services that were both "necessary to the administration of [the] case," *id.* § 330(a)(3)(C), (4)(A)(ii)(II), and "reasonably likely to benefit the

debtor's estate," *id.* § 330(a)(4)(A)(ii)(I). Were it otherwise, there would be no need to limit compensation for preparing a fee application. *See id.* § 330(a)(6). The contested fee-award procedure is a necessary process under the Code that helps the bankruptcy judge determine how much compensation should be paid out of the debtor's estate. The debtor's estate benefits when talented professionals are attracted to the bankruptcy field by the prospect of reasonable (and hence undiluted) fees.

This is not to say that defense fees should be dispensed automatically—Section 330(a)(1)(A) uses a "may," not a "shall." *See Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 346 (2005); *see also Smith*, 317 F.3d at 928 (rejecting "the *per se* award of administrative fees arising from litigation of a fee application"). Instead, bankruptcy judges must make case-by-case decisions about the need for defense fees, drawing on their unmatched familiarity with the relevant litigation. *See id.* at 929 (noting that entitlement to defense fees "depends on the circumstances and is largely a matter within the informed discretion of the bankruptcy court"); *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (noting lower court's "superior understanding of the litigation"); *Trustees v. Greenough*, 105 U.S. 527, 537 (1882) (noting lower court's "far better means of knowing what is just and reasonable"). The Fifth Circuit's observation that, "[i]n bankruptcy, the equities are quite different," confirms the wisdom of leaving these decisions to *bankruptcy* judges—those who understand the equities better than anyone. Pet. App. 17a.

The case-by-case exercise of defense-fee discretion has not caused problems in the many places where the practice occurs. To avoid inviting litigation for litigation's sake, courts reduce or deny compensation for the unsuccessful prosecution of fee applications. *See, e.g.*, *Boldt v. Crake (In re Riverside-Linden Inv. Co.)*, 945 F.2d 320, 322–23 (9th Cir. 1991); *Prappas & Eidman v. Smith (In re Mira-Pak, Inc.)*, 922 F.2d 214, 215–16 (5th Cir. 1991) (per curiam); *In re Quigley Co.*, 500 B.R. 347, 370–71 (Bankr. S.D.N.Y. 2013); *cf. Comm'r v. Jean*, 496 U.S. 154, 163 n.10 (1990) ("[F]ees for fee litigation should be excluded to the extent that the applicant ultimately fails to prevail in such litigation."). Some bankruptcy judges limit the defense-fee amount to a single-digit percentage of the underlying fee. *See, e.g.*, Pet. App. 141a n.124 (collecting cases); *In re Millennium Multiple Emp'r Welfare Benefit Plan*, 470 B.R. 203, 217–18 (Bankr. W.D. Okla. 2012). Others probe defense-fee reasonableness without taking such shortcuts. *See, e.g.*, *In re Kahuku Hosp.*, No. 07-176, 2011 WL 5884144, at *5–*6 (Bankr. D. Haw. Nov. 23, 2011); *In re Geneva Steel Co.*, 258 B.R. 799, 803–04 (Bankr. D. Utah 2001). "There is no precise rule or formula for making these determinations," *Hensley*, 461 U.S. at 436, but bankruptcy judges can be trusted to use their "great leeway" in determining defense fees to avoid the twin evils of vicarious generosity and fee dilution, *Gagne v. Maher*, 594 F.2d 336, 344 (2d Cir. 1979).

III. The Decision Below Prevents The Bankruptcy Court From Carrying Out Section 330(a)'s Commands.

The Fifth Circuit's reading of Section 330(a) is unsound because it deprives bankruptcy judges of discretionary authority to avert fee dilution on a case-by-case basis, preventing them from awarding reasonable compensation for necessary services. Implicitly conceding this flaw, the opinion below suggests two alternative solutions: inflated billing rates and fee-shifting sanctions. These stopgaps offer inadequate protection against a brain drain caused by bankruptcy's "unique process" for scrutinizing fee applications. Pet. App. 138a.

After telling professionals that "defend[ing] their fee applications [is] a cost of doing business" in bankruptcy, the Fifth Circuit invites them to take self-help measures. Pet. App. 17a–18a. Specifically, the opinion below advises that "[w]hen firms become aware that they may not be reimbursed for defending core fee applications, they can anticipate this possibility in their hourly rates." Pet. App. 18a n.7.

This rate-padding scheme will make the fee award process less transparent—undermining the open and rigorous fee-review process the Bankruptcy Code establishes—but it will not undo the dilution caused by the Fifth Circuit's holding. A professional who artificially inflates her hourly rate to account for the bankruptcy-specific risk of fee litigation should draw scrutiny from the bankruptcy judge, who must consider "the rates charged for such services" and "the customary compensation charged by comparably skilled practitioners in" non-bankruptcy cases.

11 U.S.C. § 330(a)(3)(B), (F); *see In re Fleming Cos.*, 304 B.R. 85, 92–93 (Bankr. D. Del. 2003); 28 C.F.R. pt. 58, app. A, § (b)(1)(iii). And under the Fifth Circuit's atextual "test of reasonableness and necessity *to the debtor's estate*," the professional could hardly justify receipt of such a premium. Pet. App. 16a. As the Fifth Circuit might put it, "[t]he primary beneficiary of [an anti-dilution rate premium], of course, is the professional." Pet. App. 15a.

In any event, there is no sense in wresting discretion from the bankruptcy judge and giving it to the professionals who seek to be paid out of the estate. If fee dilution "is in the eye of the beholder," Pet. App. 19a, that would seem to counsel against deferring to those accused of complicity in a "conspiracy of silence," Pet. App. 20a (quoting *Pierson & Gaylen v. Creel & Atwood (In re Consol. Bancshares, Inc.)*, 785 F.2d 1249, 1255 (5th Cir. 1986)). The notion that a "claim for comparability is easily made but difficult to analyze" calls for more reliance on expert bankruptcy judges, not less. Pet. App. 18a. A bankruptcy judge who has discretion to award reasonable defense fees is not bound to do so at the request of a professional with "perverse incentives." *Id.* The bankruptcy judge can always say no. *See Jean*, 496 U.S. at 163 ("Exorbitant, unfounded, or procedurally defective fee applications are matters that the [judge] can recognize and discount."); *In re S. Cal. Sunbelt Developers, Inc.*, 608 F.3d 456, 463 n.2 (9th Cir. 2010) ("[W]e reject [the] contention that permitting recovery of fees on fees fosters a 'lottery mentality' and invites debtors to engage in excessive fee litigation.").

The opinion below also expresses "confiden[ce] that bankruptcy courts, practicing vigilance and sound case management, can thwart punitive or excessively costly attacks on professional fee applications." Pet. App. 21a. Flattering words aside, the Fifth Circuit's interpretation of Section 330(a) deprives bankruptcy judges of the authority they need to manage their cases. Vigilance alone will not get the job done, and neither will the fee-shifting sanctions proposed by the opinion below. *See id.* (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991)); *see also* FED. R. BANKR. P. 9011.

The standard for imposing sanctions is too high for bankruptcy judges to prevent dilution with that rarely used cudgel. *See Chambers*, 501 U.S. at 44 (dictating "restraint and discretion"); *Santa Fe Minerals, Inc. v. BEPCO, L.P. (In re 15375 Mem'l Corp.)*, 430 B.R. 142, 150 (Bankr. D. Del. 2010) (demanding "exceptional circumstances where a claim is patently unmeritorious or frivolous" (internal quotation marks omitted)). In many bankruptcy cases, fee dilution is likely to occur even if the professional cannot show that "the very temple of justice has been defiled" by an objection to her application. *Chambers*, 501 U.S. at 46 (internal quotation marks omitted). The "no-win situation" described by Bankruptcy Judge Schmidt, in which "the resources the applicant would expend fighting objections could quickly overtake the value of the reduction the objector sought," Pet. App. 140a, will discourage bankruptcy practice without regard to the presence or absence of "bad-faith conduct," *Chambers*, 501 U.S. at 47.

The inadequacy of sanctions can be illustrated with a hypothetical: Suppose the bankruptcy judge, acting sua sponte under Section 330(a)(2), flags a perceived problem with the professional's fee application. The professional prepares a response, at some nontrivial cost, and the bankruptcy judge is ultimately persuaded to award fees as originally requested by the application. Nobody has done anything wrong here. To the contrary, the process is precisely what the Bankruptcy Code requires. The bankruptcy judge has performed his "*duty* to review fee applications," *In re Busy Beaver Bldg. Ctrs., Inc.*, 19 F.3d 833, 841 (3d Cir. 1994) (emphasis added), while the professional has provided a service "necessary to the administration of the case" within the meaning of Section 330(a)(4)(A)(ii)(II) by preparing a useful response to the concerns from the bench. The bankruptcy judge certainly will not sanction himself, so the Fifth Circuit's sanctions-only approach will force the professional to bear the bankruptcy-specific cost of defending her successful application. That cannot be right—Section 330(a) must be understood to give bankruptcy judges the power to effect the statute's anti-dilution command.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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Supreme Court of the United States

BAKER BOTTS L.L.P. AND JORDAN, HYDEN, WOMBLE, CULBRETH & HOLZER, P.C.,

Petitioners,

v.

ASARCO LLC,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF BANKRUPTCY TRUSTEES AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

Whether 11 U.S.C. § 330(a) grants a bankruptcy judge discretion to award compensation for the defense of a fee application.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 9

I. Section 330 Allows Bankruptcy Courts Sufficient Discretion To Award Compensation For The Successful Defense Of Fee Applications 9

A. Compensation Of Fees Incurred In Connection With The Successful Defense Of Fee Applications Is Necessary To The Administration Of A Bankruptcy Case 11

B. Compensation Of Fees Incurred In Connection With The Successful Defense Of Fee Applications Is Necessary To Ensure That A Chapter 7 Trustee's Professionals' Compensation Is Based On "The Customary Compensation Charged By Comparably Skilled Practitioners" In Non-Bankruptcy Cases 14

C. Section 330(a)(4)(A) Does Not Expressly Exclude Compensation Of Fees Incurred In Connection With The Successful Defense Of Fee Applications 15

II. A Rule That Forbids Bankruptcy Courts From Compensating Professionals For Defending Fee Applications May Discourage Competent Professionals From Representing Chapter 7 Trustees, Thereby Harming The Bankruptcy System 16

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

CASES

Asarco LLC v. Baker Botts, L.L.P. and Jordan, Hyden, Womble, Culbreth & Holzer, P.C. (In re Asarco LLC), Case No. 2:11-cv-290, 2012 WL 3526610 (S.D. Tex. Aug. 8. 2012) 13, 14

Boyd v. Engman (In re Engman II), 404 B.R. 467 (W.D. Mich. 2009) 7, 10, 13

Hairston v. R & R Apartments, 510 F.2d 1090 (7th Cir. 1975) 15

In re Ambotiene, 316 B.R. 25 (Bankr. E.D.N.Y. 2004) 6

In re Amr Mohsen, 506 B.R. 96 (N.D. Cal. 2013) 17, 18

In re Asarco LLC, No. 05–21207, 2011 WL 2974957 (Bankr. S.D. Tex. July 20, 2011) 10

In re Byrd, No. 04-35620, 2011 WL 589907 (Bankr. D. Md. Feb. 10, 2011) 6, 18

In re Siskin, No. 02–10373, 2011 WL 4899868 (Bankr. S.D.N.Y. Oct. 13, 2011) 2

In re Smith, 317 F.3d 918 (9th Cir. 2002) 7, 8, 10, 14

In re UNR Industries, Inc.,
986 F.2d 207 (7th Cir. 1993) 3

In re Worldwide Direct Inc.,
334 B.R. 108 (D. Del. 2005) 5, 16, 17

Jacobowitz v. Double Seven Corp.,
378 F.2d 405 (9th Cir. 1967) 3

Johnson v. Mississippi,
606 F.2d 635 (5th Cir. 1979) 15

Magic Valley Evangelical Free Church, Inc. v. Fitzgerald (In re Hodge),
220 B.R. 386 (D. Idaho 1998) 4

Ortho Pharmaceutical Corp. v. Smith,
959 F.2d 936 (Fed. Cir. 1992) 9

Pentech Pharmaceuticals, Inc. v. Par Pharmaceutical, Inc.,
597 F. Supp. 2d 758 (N.D. Ill. 2009) 9

Prandini v. National Tea Co.,
585 F.2d 47 (3d Cir. 1978) 15

Russello v. United States,
464 U.S. 16 (1983) 8, 15

STATUTES

11 U.S.C. § 327(a) 12

11 U.S.C. § 330(a)(1) 5

11 U.S.C. § 330(a)(1)(A) 6, 9

11 U.S.C. § 330(a)(1)(B) 6

11 U.S.C. § 330(a)(3)(C) 4, 7, 10, 11, 16

11 U.S.C. § 330(a)(3)(F) 4, 7, 8, 10, 11, 14, 15

11 U.S.C. § 330(a)(4)(A) 8, 10, 11, 15, 16

11 U.S.C. § 330(a)(4)(A)(i) 16

11 U.S.C. § 330(a)(4)(A)(ii) 16

11 U.S.C. § 503(b)(2) 7, 13

11 U.S.C. § 704(a) 7, 12

11 U.S.C. § 704(a)(1) 1, 2, 12

11 U.S.C. § 704(a)(4) 2, 12

11 U.S.C. § 704(a)(5) 2, 12

11 U.S.C. § 704(a)(6) 2, 12

11 U.S.C. § 704(a)(8) 2, 12

28 U.S.C. § 586(a)(1) 1

OTHER AUTHORITIES

Fed. R. Bankr. P. 2016(a) 5

H.R. Rep. No. 95-595 (1977) 3, 7, 13, 14

Committee on the Judiciary, Hearing on Professional Fees in Bankruptcy (Mar. 24, 1992) 5

INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Bankruptcy Trustees ("NABT") submits its brief in support of Petitioners, and respectfully urges the Court to conclude that bankruptcy courts have the discretion to award compensation for the defense of fee applications.

NABT is a non-profit professional association formed in 1982 to address the needs of chapter 7 bankruptcy trustees throughout the country, and to promote the effectiveness of the bankruptcy system as a whole. There are approximately 1,100 chapter 7 bankruptcy trustees currently receiving new cases, and the vast majority of them are NABT members. In forty-eight states and the federal territories, the United States Trustee has the responsibility of appointing chapter 7 panel trustees pursuant to 28 U.S.C. § 586(a)(1).[2] A trustee is appointed in every chapter 7 case. The trustee has primary responsibility for all aspects of chapter 7 case administration.

Chapter 7 trustees, as the fiduciaries responsible for the administration of all chapter 7 bankruptcy cases, are charged with preserving and promoting the system's integrity by, among other things, efficiently administering their bankruptcy cases. 11

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[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the amicus curiae, its members, and its counsel made any monetary contribution to its preparation and submission. The parties have consented to this filing.

[2] In Alabama and North Carolina, chapter 7 trustees are appointed by bankruptcy administrators.

U.S.C. § 704(a)(1). Many of a chapter 7 trustee's duties require the assistance of attorneys, accountants, or other professionals. *Id.* at §§ 704(a)(1), (4), (5), (6), (8). Thus chapter 7 trustees have an interest in ensuring that the most capable professionals are willing to work on bankruptcy cases.

The Fifth Circuit's decision that bankruptcy courts lack the discretion to award compensation from the estate to professionals for the successful defense of a fee application imposes what effectively amounts to a surcharge or tax on bankruptcy work and may cause competent professionals to decline bankruptcy engagements. The NABT submits that this bankruptcy "tax" will be felt most in chapter 7 cases where professional fees are relatively small and the likelihood of unwarranted fee objections greatest. It is not uncommon for disgruntled *pro se* debtors to mount a barrage of litigation against their case trustee, including challenging the award of compensation to the trustee's attorneys, accountants, and other professionals. *See, e.g.*, *In re Siskin*, No. 02–10373, 2011 WL 4899868, at *7 (Bankr. S.D.N.Y. Oct. 13, 2011) (overruling debtor's 37-page fee objection "laced throughout with *ad hominem* attacks directed at the Trustee and his professionals"). When total compensation in chapter 7 cases is often under $10,000, incurring even a $1,000 fee to defend against an attack on the professional's fees can result in a significant reduction of the professional's compensation. The NABT's position, therefore, is that the Bankruptcy Code grants bankruptcy courts the discretion to award compensation from estate assets for fees incurred successfully defending a fee

application when the bankruptcy court deems it appropriate to allow such fees.

SUMMARY OF THE ARGUMENT

When Congress enacted the modern Bankruptcy Code, it recognized the importance of providing fair compensation to the professionals who represent bankruptcy trustees. Congress understood that competent bankruptcy specialists would not remain in the field "if required to accept fees in all of their cases that are consistently lower than fees they would receive elsewhere." H.R. Rep. No. 95-595, at 330 (1977); *see also In re UNR Indus., Inc.*, 986 F.2d 207, 209 (7th Cir. 1993). Thus, Congress legislated a change to the policy that existed under the prior Bankruptcy Act of requiring bankruptcy attorneys to "be paid ... appreciably less than [they] could command for similar services" outside of bankruptcy. *Jacobowitz v. Double Seven Corp.*, 378 F.2d 405, 407 (9th Cir. 1967).

Instead of subordinating professionals' fees to the "economy of the estate," Congress made changes to the Bankruptcy Code to ensure that there would be parity between the fees professionals could earn in bankruptcy cases and those they could earn elsewhere. *See* H.R. Rep. No. 95-595, at 330 (1977). The Bankruptcy Code accomplished this congressional directive in two ways: (1) by expressly commanding bankruptcy courts to consider whether the requested compensation "is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title"; and (2) by directing that services that are "necessary to the administration" of a case or that

are "rendered toward the completion of" a case are beneficial to the estate and thus compensable. 11 U.S.C. §§ 330(a)(3)(C), (F).

Congress achieved its objective of attracting highly skilled professionals to the field of bankruptcy administration. According to statistics compiled by the Office of the United States Trustee, between 2011 and 2013, chapter 7 trustees closed the administration of 182,262 chapter 7 cases, distributing approximately $8.3 billion to creditors.[3] As these statistics demonstrate, chapter 7 trustees and the professionals they employ play an important role in the nation's economy, returning significant dollars to creditors and helping ease the financial impact of business and consumer failures. "[T]he federal government's interest in maintaining the bankruptcy system is one of the highest order and must, therefore, be regarded as compelling." *Magic Valley Evangelical Free Church, Inc. v. Fitzgerald (In re Hodge)*, 220 B.R. 386, 392 (D. Idaho 1998).

While the total dollars paid to creditors over this period is very large, the mean fee paid to trustee's counsel per case over this same time period has consistently been quite small—approximately $7,000 per case.[4] For other chapter 7 professionals, the

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[3] http://www.justice.gov/ust/eo/public_affairs/data_files/ch7_asset/docs/Ch7CY2011.pdf; http://www.justice.gov/ust/eo/public_affairs/data_files/ch7_asset/docs/CH7CY2012.pdf; http://www.justice.gov/ust/eo/public_affairs/data_files/ch7_asset/docs/Ch7CY2013.pdf.

[4] *Id.*

highest reported mean fee per case is $32,939 for calendar year 2012.[5] Thus, the attorneys and accountants who make the chapter 7 bankruptcy system work earn very modest fees relative to the amounts they return to creditors.

When it comes to getting paid these modest fees, "[b]ankruptcy professionals operate in an environment that is virtually unheard of in the legal profession as a whole." Comm. on the Judiciary, Hearing on Professional Fees in Bankruptcy (Mar. 24, 1992). The Bankruptcy Code requires the submission of detailed bills that are provided to all parties in interest. *See* 11 U.S.C. § 330(a)(1); Fed. R. Bankr. P. 2016(a). Thus, those who are adverse to a trustee are entitled both to review the trustee's detailed legal bills and to object to payment. *Id.* Outside of bankruptcy, rarely does an opponent have anything to say about his adversary's legal fees.

Forcing bankruptcy professionals to shoulder the financial burden of defending their fee applications "would be to provide an unhealthy incentive for persons opposed to professional fees to mount spurious objections as a means of extracting fee reductions, rather than because the work done for the estate was genuinely not for the benefit of the estate." *In re Worldwide Direct Inc.*, 334 B.R. 108, 112 (D. Del. 2005). This perverse incentive arising out of the Fifth Circuit's ban on compensation for fee defense work would affect chapter 7 trustees disproportionally because they are the ones who most often must deal with litigious *pro se* debtors

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[5] http://www.justice.gov/ust/eo/public_affairs/data_files/ch7_asset/docs/Ch7CY2012.pdf.

and other disgruntled parties in the course of the administration of a bankruptcy estate. As a result, a chapter 7 trustee's professionals are more likely to become the targets of meritless fee objections or objections interposed for tactical reasons. *See, e.g.*, *In re Byrd*, No. 04-35620, 2011 WL 589907, at *5, 8-9 (Bankr. D. Md. Feb. 10, 2011); *In re Ambotiene*, 316 B.R. 25, 39-40 (Bankr. E.D.N.Y. 2004).

Moreover, the modest size of the legal fee that most professionals earn in a typical chapter 7 case further exacerbates the impact of the Fifth Circuit rule on professionals working for chapter 7 trustees. A professional earning a mean fee of $7,000, for example, stands to lose ten percent of her fee if she is required to spend just $700 defending her fee application. Since most objections require the professional to prepare a written response and attend at least one court hearing, a $700 fee is likely understated. This type of surcharge may cause highly skilled bankruptcy professionals to decline representations in precisely the types of difficult cases where their skills are most needed.

The Code does not require this result. Section 330 of the Bankruptcy Code grants bankruptcy courts broad discretion to award "reasonable compensation for actual, necessary services" rendered by a chapter 7 trustee's professionals as well as "reimbursement for actual, necessary expenses." 11 U.S.C. §§ 330(a)(1)(A), (B). Section 330(a)(3) establishes guideposts that bankruptcy courts must consider when determining the amount of the fee award, including whether the services provided were necessary to the administration of a

bankruptcy case and whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in non-bankruptcy cases. 11 U.S.C. §§ 330(a)(3)(C), (F). As the Ninth Circuit held in *In re Smith*, 317 F.3d 918, 929 (9th Cir. 2002), compensating professionals for the successful defense of a fee application fits squarely within these guideposts.

As a preliminary matter, the services incurred by a professional in her successful defense of a fee application *are* necessary to the administration of the bankruptcy case. 11 U.S.C. § 330(a)(3)(C). This is so for two principal reasons. *First*, a chapter 7 trustee relies upon her professionals to advise and assist the trustee with respect to the trustee's statutorily imposed duties. *See* 11 U.S.C. § 704(a). As Congress recognized when it enacted the modern Bankruptcy Code, it would be very difficult for a chapter 7 trustee to retain qualified and competent professionals if such professionals were concerned that they would be forced to absorb the cost of defending meritless objections to fee applications. H.R. Rep. No. 95-595, at 330 (1977). The assurance that services incurred in connection with the defense of a fee application, if otherwise appropriate, will be compensable therefore advances the administration of chapter 7 cases generally, as well as each case individually. *See Boyd v. Engman (In re Engman II)*, 404 B.R. 467, 483 (W.D. Mich. 2009); *accord In re Smith*, 317 F.3d at 927-30. *Second*, a chapter 7 bankruptcy case cannot be closed until the bankruptcy court finally determines the allowed administrative expenses—including professional fees awarded under Section 330. 11 U.S.C. § 503(b)(2). A

professional's successful defense of her fee application is therefore a necessary part of the final administration and closing of any chapter 7 case.

Section 330(a)(3)(F), which instructs bankruptcy courts to consider whether the award of compensation is "reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title," also supports compensating fees incurred in connection with the successful defense of a fee application. *Id.* Not compensating a chapter 7 trustee's professionals for the time and expenses associated with the successful defense of a fee application will necessarily dilute their overall compensation below that of "comparably skilled practitioners" in non-bankruptcy cases who are not required to bear the unreimbursable costs and expenses of defending a fee application. *In re Smith*, 317 F.3d at 929.

Finally, and critically, Section 330 contains two expressly enumerated instances in which a court should not award compensation: (i) where services are unnecessarily duplicative; and (ii) where services are not reasonably likely to benefit the debtor's estate or are not necessary to the administration of the estate. 11 U.S.C. § 330(a)(4)(A). Had Congress intended to except the successful defense of a fee application from what is within the bankruptcy court's discretion to award as "reasonable compensation," it could and would have done so. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another

section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotations omitted)).

Accordingly, because the Bankruptcy Code allows it, and sound public policy supports it, the NABT urges this Court to hold that bankruptcy courts have the discretion to award compensation for the successful defense of a fee application from estate assets.

ARGUMENT

I. Section 330 Allows Bankruptcy Courts Sufficient Discretion To Award Compensation For The Successful Defense Of Fee Applications.

Section 330 of the Bankruptcy Code affords bankruptcy courts broad discretion to award "reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person." 11 U.S.C. § 330(a)(1)(A). In other contexts, a statutory direction that courts apply a standard based on what is "reasonable" is viewed as granting the courts broad discretion. *See, e.g.*, *Ortho Pharm. Corp. v. Smith*, 959 F.2d 936, 945 (Fed. Cir. 1992) (injunctive relief for patent infringement); *Pentech Pharms., Inc. v. Par Pharm., Inc.*, 597 F Supp. 2d 758, 787-88 (N.D. Ill. 2009) (interest calculations for contract damages).

That conclusion is further supported by the statutory direction that in setting compensation, bankruptcy courts must consider the "nature, the extent, and the value" of a professional's services, taking into account all "relevant factors," including certain guideposts that are set forth in Sections 330(a)(3)(A)-(F). Of particular relevance to this issue, Section 330(a)(3)(C) directs bankruptcy courts to consider "whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title." *Id.* Section 330(a)(3)(F) directs bankruptcy courts to consider "whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title." *Id.* Finally, Section 330 prohibits bankruptcy courts from awarding compensation in only two narrow circumstances—when there is an "unnecessary duplication of services" or when the services are not "reasonably likely to benefit the debtor's estate" or "necessary to the administration of the case." 11 U.S.C. § 330(a)(4)(A).

With this clear statutory framework in mind, the majority of lower courts to address the issue have routinely—and correctly—held that the plain text of Section 330 provides bankruptcy courts with sufficient discretion to award compensation for the successful defense of a fee application. *See e.g. In re Smith*, 317 F.3d at 929; *Boyd*, 404 B.R. at 482–83; *see also In re Asarco LLC*, No. 05–21207, 2011 WL 2974957, at *38 n.109 (Bankr. S.D. Tex. July 20, 2011) (collecting cases). The majority of courts have reached this result for three primary reasons: *first*,

fees incurred in connection with the successful defense of a fee application are "necessary to the administration" of a bankruptcy case (11 U.S.C. § 330(a)(3)(C)); *second*, compensation of fees incurred in connection with the successful defense of a fee application is necessary to ensure that a chapter 7 trustee's professionals receive "customary compensation charged by comparably skilled practitioners" in non-bankruptcy cases (11 U.S.C. § 330(a)(3)(F)); and *third*, Section 330, which expressly prohibits compensation in certain instances, imposes no prohibition on the reimbursement of fees incurred in the successful defense of a fee application. (*See* 11 U.S.C. § 330(a)(4)(A)).

A. Compensation Of Fees Incurred In Connection With The Successful Defense Of Fee Applications Is Necessary To The Administration Of A Bankruptcy Case.

Compensation of fees incurred in connection with the successful defense of fee applications benefits the administration of bankruptcy cases generally, as it removes what would otherwise be an impediment to a chapter 7 trustee's ability to retain competent and qualified counsel. It also benefits the administration of each specific bankruptcy case, as the resolution of professional fees is a necessary component of resolving and completing the administration of a bankruptcy case. Accordingly, Section 330(a)(3)(C), which directs bankruptcy courts to take into account whether the services performed were necessary to the administration of the bankruptcy case, supports

the allowance of fees incurred in connection with the successful defense of a fee application.

Section 327(a) of the Bankruptcy Code authorizes a chapter 7 trustee to employ attorneys and other professional persons to represent and assist the trustee in carrying out the trustee's duties. 11 U.S.C. § 327(a). A chapter 7 trustee's duties, enumerated in Section 704(a) of the Bankruptcy Code, are numerous, and often require the trustee to engage experienced attorneys and professionals to, *inter alia*, prosecute avoidance and recovery actions for the benefit of the estate, investigate the financial affairs of the debtor, review and object to claims, file objections to a debtor's discharge, and prepare and file financial and tax reports. *See* 11 U.S.C. §§ 704(a)(1), (4), (5), (6), (8). As Congress recognized when it enacted Section 330 of the modern Bankruptcy Code, if professionals employed by a trustee are not compensated reasonably for the reasonable services they provide:

> [A]ttorneys that could earn much higher incomes in other fields would leave the bankruptcy arena. Bankruptcy specialists, who enable the system to operate smoothly, efficiently, and expeditiously, would be driven elsewhere, and the bankruptcy field would be occupied by those who could not find other work and those who practice bankruptcy law only occasionally almost as a public service. [If] required to accept fees in all of their [bankruptcy] cases that are consistently lower than fees they could receive elsewhere,

> [attorneys] will not remain in the bankruptcy field.

H.R. Rep. No. 95-595, at 330 (1977). The bankruptcy court's discretion to award compensation to a chapter 7 trustee's professionals, including compensation in connection with the successful defense of fee applications, is critical to the chapter 7 trustee's ability to retain competent and qualified counsel, and therefore to the overall administration of bankruptcy cases generally, and to each individual case as well. As the bankruptcy court in *Boyd* explained, "the underlying purpose of Section 330(a) and other federal statutes allowing for attorney fees show that [time spent successfully defending fee applications] is necessary and beneficial to the bankruptcy system as a whole, and indirectly, to each estate participating in the system." 404 B.R. at 483.

Awarding professionals compensation for litigation over the defense of fee applications also benefits the administration of a bankruptcy case because such litigation is necessary to determine the amount of "compensation and reimbursement *awarded* under section 330(a)" as administrative expenses. 11 U.S.C. § 503(b)(2) (emphasis supplied). Because the successful defense of a fee application results in the determination of the ultimate award of fees, it necessarily benefits the administration of the chapter 7 case: "actions in resolving outstanding fee issues clearly benefits the estate. ... the bankruptcy case cannot be put to bed until these matters are resolved." *Asarco LLC v. Baker Botts, L.L.P. and Jordan, Hyden, Womble, Culbreth & Holzer, P.C., (In re Asarco LLC)*, Case No. 2:11-cv-290, 2012 WL

3526610, at * 17 (S.D. Tex. Aug. 8. 2012); *see also In re Smith*, 317 F.3d at 929 (services incurred in defense of fee application "were necessary for the administration of the case and provided a benefit to the debtor's estate in determining the amount of the administrative fees that the estate owed ...").

B. Compensation Of Fees Incurred In Connection With The Successful Defense Of Fee Applications Is Necessary To Ensure That A Chapter 7 Trustee's Professionals' Compensation Is Based On "The Customary Compensation Charged By Comparably Skilled Practitioners" In Non-Bankruptcy Cases.

Section 330(a)(3)(F) also supports compensation of fees incurred in connection with the successful defense of fee applications. Section 330(a)(3)(F) directs bankruptcy courts to consider "whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title." *Id.* If a chapter 7 trustee's professionals were not compensated for their successful defense of fee applications, the effect would be to dilute their compensation below that of "comparably skilled practitioners" in non-bankruptcy cases. *See In re Smith*, 317 F.3d at 929. Indeed, this is just the problem that Congress attempted to resolve when it enacted Section 330(a). *See* H.R. Rep. No. 95-595, at 330 (1977). It logically follows, then, that permitting bankruptcy courts the discretion to award fees incurred in connection with the successful defense of

fee applications furthers Section 330(a)(3)(F)'s directive that fees be reasonable when measured against those charged by comparably skilled practitioners.

Moreover, in other contexts where federal courts award fees, federal courts have the discretion to allow compensation for fees incurred defending a fee application. *See, e.g.*, *Johnson v. Mississippi*, 606 F.2d 635, 637-38 (5th Cir. 1979) (civil rights litigation); *Prandini v. Nat'l Tea Co.*, 585 F.2d 47, 52-53 (3d Cir. 1978) (Title VII litigation); *Hairston v. R & R Apartments*, 510 F.2d 1090, 1092-93 (7th Cir. 1975) (Fair Housing Act litigation). This too supports the conclusion that allowing such compensation is necessary to ensure "parity" with non-bankruptcy professionals.

C. Section 330(a)(4)(A) Does Not Expressly Exclude Compensation Of Fees Incurred In Connection With The Successful Defense Of Fee Applications.

Finally, Section 330(a)(4)(A)'s exclusion of certain services from compensability indicates that Congress knew how to place express limitations on categories of compensation, and chose not to except the successful defense of a fee application from what is within the bankruptcy court's discretion to award as "reasonable compensation" under Section 330(a). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello*, 464 U.S. at 23 (internal quotations omitted).

Congress specifically prohibited bankruptcy courts from awarding compensation for "(i) unnecessary duplication of services" and for "(ii) services that were not—(I) reasonably likely to benefit the debtor's estate; or (II) necessary to the administration of the case." 11 U.S.C. § 330(a)(4)(A)(i),(ii). Had Congress intended to prohibit all compensation for defending a fee application, it would have included a subpart III to the statute banning compensation for defending an objection to a fee application. Instead it included provisions making it clear that the administrative tasks necessary to the administration of a case and necessary to close a case—such as prosecuting final fee applications—are compensable. 11 U.S.C. §§ 330(a)(3)(C), (4)(A).

II. A Rule That Forbids Bankruptcy Courts From Compensating Professionals For Defending Fee Applications May Discourage Competent Professionals From Representing Chapter 7 Trustees, Thereby Harming The Bankruptcy System.

The Fifth Circuit's unnecessary ban on compensation for fee defense work has two perverse results that impact chapter 7 trustees and their professionals in a disproportionate manner.

First, "requiring counsel who has successfully defended a fee claim to bear the costs of that defense" is precisely the same as cutting counsel's rate or denying compensation for other hours devoted to the matter. *In re Worldwide Direct Inc.*, 334 B.R. at 112. "The economic effect is precisely contrary to the ... instruction that bankruptcy professionals are to

stand on an equal footing with their non-bankruptcy counterparts." *Id.* In chapter 7 cases, where the average fee paid to counsel is $7,000, the impact of that surcharge can be disproportionally high.[6]

Second, the absolute ban on compensation for fee defense work creates "an unhealthy incentive for persons opposed to professional fees to mount spurious objections as a means of extracting fee reductions, rather than because the work done for the estate was genuinely not for the benefit of the estate." *In re Worldwide Direct Inc.*, 334 B.R. at 112. This unhealthy incentive is exacerbated in chapter 7 cases where *pro se* disgruntled debtors often wage litigation campaigns against chapter 7 trustees and their professionals who are doing their jobs.

Reported cases provide illustrative examples. In 2005, for example, Amr Mohsen, a convicted felon serving time for perjury, obstruction of justice, and witness tampering, filed a chapter 11 bankruptcy case while serving a 17-year sentence for his crimes. *In re Amr Mohsen*, 506 B.R. 96, 100 (N.D. Cal. 2013). The bankruptcy court converted his case to one under chapter 7 resulting in the appointment of a chapter 7 trustee. During her administration of the chapter 7 estate, the chapter 7 trustee took a number of actions that Mr. Mohsen opposed, including piercing the corporate veil and seizing assets from

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[6] http://www.justice.gov/ust/eo/public_affairs/data_files/ch7_asset/docs/Ch7CY2011.pdf; http://www.justice.gov/ust/eo/public_affairs/data_files/ch7_asset/docs/CH7CY2012.pdf; http://www.justice.gov/ust/eo/public_affairs/data_files/ch7_asset/docs/Ch7CY2013.pdf.

three entities Mr. Mohsen controlled. *Id.* at 100-01. When the trustee petitioned for leave to pay her counsel, Mr. Mohsen objected to her attorney's fee petition and appealed that objection. *Id.* at 101-03. As a result, counsel had to submit two briefs in opposition to the objection in the bankruptcy court and to brief the subsequent appeal. *Id.* at 102.

Similarly, *In re Byrd* demonstrates the difficulties trustees face when unwitting debtors are placed into an involuntary chapter 7 bankruptcy by their creditors. Starting with the initial order for relief, the Byrds continuously objected to motions and withheld information to subvert the administration of their involuntary chapter 7 case. 2011 WL 589907, at *1-2. The Byrds' relentless efforts to undermine the trustee's work turned the case into a "long and tortuous" nine year affair. *Id.* at *1. The Byrds made one last objection to the trustee's final report and request for compensation, forcing the trustee to defend his fees during two hearings at which the debtors failed to appear. *Id.* The court overruled the Byrds' objection and approved the trustee's compensation request. *Id.* at *11.

Denying compensation for defending fee applications in cases like *In re Mohsen* and *In re Byrd* would create a significant disincentive for professionals to represent chapter 7 trustees in the most difficult of cases where skilled counsel is most necessary to ensure the integrity of the bankruptcy system. The end result of driving the most competent of professionals out of the system may be that chapter 7 bankruptcy cases, which currently return

on average $2.7 billion to creditors each year, will be less successful and creditors and the nation's economy will suffer.[7] Congress intended the opposite result when it enacted Section 330 of the Bankruptcy Code. The Court should reverse the Fifth Circuit's decision.

CONCLUSION

For the foregoing reasons, *amicus curiae* National Association of Bankruptcy Trustees requests that the judgment of the court of appeals be reversed.

December 8, 2014 Respectfully submitted,

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[7] http://www.justice.gov/ust/eo/public_affairs/data_files/ch7_asset/docs/Ch7CY2011.pdf; http://www.justice.gov/ust/eo/public_affairs/data_files/ch7_asset/docs/CH7CY2012.pdf; http://www.justice.gov/ust/eo/public_affairs/data_files/ch7_asset/docs/Ch7CY2013.pdf.

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In The

Supreme Court of the United States

BAKER BOTTS, L.L.P., et al.,

Petitioners,

v.

ASARCO, L.L.C.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CHAPTER THIRTEEN TRUSTEES AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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TABLE OF CONTENTS

	Page
Interest of the *Amicus Curiae*	1
Summary of the Argument	3
Argument	5
I. Section 330 grants implicit authority to award compensation for reasonable litigation of fee applications	5
II. Permitting compensation for reasonable litigation of fee applications in bankruptcy is consistent with the clear goals of § 330	8
III. Routine diminution of attorney's fees would threaten the chapter 13 bankruptcy system	12
A. An effective and efficient chapter 13 bankruptcy system demands qualified debtors' attorneys	13
B. Resource limitations in consumer cases necessitate high-volume practices with low margins and low fees	15
Conclusion	18

TABLE OF AUTHORITIES

Page

CASES

Boyd v. Engman, 404 B.R. 467 (W.D. Mich. 2009) 10

Commissioner, INS v. Jean, 496 U.S. 154 (1990) 11

In re ASARCO, L.L.C., 751 F.3d 291 (5th Cir. 2014) 7, 16

In re Gustav Schaeter Company, 103 F.2d 237 (6th Cir. 1939) 2

In re Nucorp Energy, Inc., 764 F.2d 655 (9th Cir. 1985) 9

In re Smith, 317 F.3d 918 (9th Cir. 2002) 7

Kay v. Ehrler, 499 U.S. 432 (1991) 9

Lamie v. U.S. Trustee, 540 U.S. 526 (2004) 8

Matter of Maddox, 15 F.3d 1347 (5th Cir. 1994) 2

Rugiero v. Nationstar Mortg., LLC, 580 Fed. App'x 376 (6th Cir. 2014) 15

CONSTITUTIONS, STATUTES AND RULES

11 U.S.C. § 327 ..... 6, 8

11 U.S.C. § 330 ..... *passim*

11 U.S.C. § 330(a)(1) 6, 7

11 U.S.C. § 330(a)(1)(A) 10

11 U.S.C. § 330(a)(3) 6

11 U.S.C. § 330(a)(4)(A) 5, 6, 7, 8

TABLE OF AUTHORITIES – Continued

Page

11 U.S.C. § 330(a)(4)(B) 6, 7, 8, 9, 10

11 U.S.C. § 330(a)(6) 6, 7

11 U.S.C. § 541(a)(1) 15

11 U.S.C. § 1302 2

11 U.S.C. § 1306(a)(1) 15

11 U.S.C. § 1322(d) 15

11 U.S.C. § 1325(b)(4) 15

28 U.S.C. § 586 1

Fed. R. Bankr. P. 9011 11

Sup. Ct. R. 37.2(a) 1

Sup. Ct. R. 37.6 1

OTHER AUTHORITIES

124 Cong. Rec. H32, 394 (1978) 9

Administrative Office of the U.S. Courts, *Table F-2: U.S. Bankruptcy Courts – Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending September 30, 2014* 12

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Keith M. Lundin & William H. Brown, *Chapter 13 Bankruptcy* (4th ed.) 10, 14, 15, 17

TABLE OF AUTHORITIES – Continued

Page

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Elizabeth Warren, *A Principled Approach to Consumer Bankruptcy*, 71 Am. Bankr. L.J. 483 (1997) 13

Todd J. Zywicki, *An Economic Analysis of the Consumer Bankruptcy Crisis*, 99 Nw. U. L. Rev. 1463 (2005) 16

INTEREST OF THE *AMICUS CURIAE*

The National Association of Chapter Thirteen Trustees ("NACTT") is a non-profit, educational organization composed of consumer bankruptcy professionals.[1] Its membership represents a broad spectrum of participants in the consumer bankruptcy process including debtors' attorneys, creditors' representatives, and chapter 13 standing trustees. The NACTT's voting membership is composed of private trustees appointed by the U.S. Department of Justice, Executive Office of the U.S. Trustee, *see* 28 U.S.C. § 586, and in the federal judicial districts of North Carolina and Alabama by the judiciary. Approximately 98% of the chapter 13 standing trustees in the United States are voting members of the NACTT. Robert B. Wilson, a Chapter 13 Standing Trustee for the Northern District of Texas and current president of the NACTT, and the NACTT's Board of Directors, have directly authorized Henry E. Hildebrand, III, Chapter 13 Standing Trustee for the Middle District of

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[1] Pursuant to Supreme Court Rule 37.2(a), the NACTT states that the petitioner has filed a letter with the Court granting blanket consent to the filing of *amicus curiae* briefs and that the respondent has consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, the NACTT states that no counsel for a party authored this brief in whole or in part and that neither counsel for a party nor any party made a monetary contribution intended to fund the preparation or submission of the brief. The NACTT is a non-profit association and has used its own resources in preparing this brief.

Tennessee, to prepare and submit this *amicus curiae* brief on the NACTT's behalf.

Historically, Congress and federal courts have observed that the more efficient and effective chapter 13 programs are those conducted by chapter 13 standing trustees who exercise a broad range of responsibilities in both the design and effectuation of chapter 13 plans. *See Matter of Maddox*, 15 F.3d 1347, 1355 (5th Cir. 1994). A chapter 13 trustee has a statutory responsibility to participate in the confirmation and administration of every chapter 13 plan. *See* 11 U.S.C. § 1302. A chapter 13 trustee, like bankruptcy trustees in general, is charged with a responsibility to the system and to maximize recoveries to creditors. The trustee is empowered to assert claims, avoid preferences and fraudulent transfers, collect property of the estate, and examine and object to creditors' claims in furtherance of the congressional goal of equitably distributing property of the estate to holders of allowed claims. *Maddox*, 15 F.3d at 1355; *In re Gustav Schaeter Company*, 103 F.2d 237 (6th Cir. 1939). The trustee represents the interests of all creditors by exercising various powers to ensure that the collection of the debtor's disposable income and disbursement of that money to creditors pursuant to a confirmed plan occurs according to the dictates of Congress, as set forth in title 11 of the United States Code (the "Bankruptcy Code"). *Maddox*, 15 F.3d at 1355.

The NACTT and its members offer an important perspective on the issues in this case. The issues

before the court stem from a large business bankruptcy case, but the Court's decision may also affect compensation in consumer bankruptcy cases, including chapter 13 cases. The NACTT and its members are acutely aware of the importance of qualified counsel in chapter 13 cases. The complexity of the body of law in chapter 13 cases makes attorney involvement critical. Any threat to the viability of chapter 13 practice is, therefore, a threat to the chapter 13 system, and because chapter 13 practice generally involves relatively low profit margins on high case volumes, even small reductions in attorneys' fees can affect that viability.

SUMMARY OF THE ARGUMENT

The NACTT agrees with the petitioner that § 330 of the Bankruptcy Code permits courts to award compensation for fees incurred for reasonable litigation of a fee application. The statute provides a broad grant of authority subject to specific prohibitions. The prohibitions do not apply to compensation for the litigation of fee application, and the clear negative implication is that the services are compensable. The NACTT, however, also notes that the statute's restrictions on compensation do not apply to the same degree in chapter 13 cases as in other cases and urges the Court to recognize the distinction between attorneys representing the petitioner and attorneys representing chapter 13 debtors if the Court affirms the Fifth Circuit in this case.

The purposes of § 330 support the petitioner's statutory construction. An overarching goal of the statute since the 1978 Bankruptcy Act has been to ensure qualified professional participation in the bankruptcy system by providing compensation commensurate with the compensation for similar non-bankruptcy-related services. The categorical denial of fees for defending a fee application has the effect of diluting the fees that can be obtained by bankruptcy professionals, thwarting the congressional goal of providing comparable compensation. By allowing objecting parties to force a non-compensable fee award defense, the Fifth Circuit has given such parties the power to force fee applicants into a lose-lose proposition – suffer losses from defending a fee application or accept a fee reduction to avoid the costs. This result is uniquely pernicious in the chapter 13 context, where the fees subject to objection by creditors and others include fees for representing the debtor's interests.

A contextual analysis of § 330 also supports the petitioner's interpretation. Section 330 applies not only in large business bankruptcy cases but also in the consumer bankruptcy cases that represent the large majority of filed bankruptcy cases. An efficient and effective consumer bankruptcy system depends on qualified debtors' attorneys, especially in chapter 13 cases. Unsurprisingly, however, the resources available to compensate debtors' attorneys in chapter 13 cases are limited, and providing fees to attract qualified counsel is challenging. A viable consumer

bankruptcy practice generally involves a high volume of relatively low-fee cases. The margins on these cases are low, so *any* fee dilution presents a meaningful threat. The reality, moreover, is that the costs of any fee defense in chapter 13 cases are likely to be significant in relation to the core fees simply because of the size of the core fees.

The NACTT, therefore, urges the Court to reverse the decision of the Court of Appeals. Even though a chapter 13 trustee, as a party that may contest a fee application, may be placed in a more advantageous position under the Fifth Circuit's holding, the NACTT urges reversal because of the broad impact the holding has on the overall system.

ARGUMENT

I. Section 330 grants implicit authority to award compensation for reasonable litigation of fee applications

The NACTT agrees with the petitioner that § 330 of the Bankruptcy Code implicitly authorizes courts to award compensation for reasonable litigation of fee applications. The NACTT also emphasizes, however, that the restrictions on compensation in § 330(a)(4)(A) do not apply to the same degree in chapter 13 cases as in other cases and urges the Court to recognize the distinctions in any decision affirming the Fifth Circuit in this case.

Section 330 contains a broad grant of authority to award "reasonable compensation for actual, necessary services rendered" by, among others, professional persons employed by a trustee under § 327. 11 U.S.C. § 330(a)(1). The statute provides factors for determining the amount of the reasonable compensation, 11 U.S.C. § 330(a)(3), (4)(B), but it only categorically prohibits compensation for:

> (i) unnecessary duplication of services; or
>
> (ii) services that were not –
>
> (I) reasonably likely to benefit the debtor's estate; or
>
> (II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A). The clear negative implication of this provision is that services that *are* reasonably likely to benefit the estate or necessary to the administration of the case are compensable. Determining the amount of compensation under § 330 is necessary to the administration of the case, so the costs of reasonable litigation in furtherance of that determination are compensable under § 330.

Section 330(a)(6) is entirely consistent with this interpretation. It provides specific guidance for determining the *amount* of the permissible compensation for preparing a fee application without any express grant of authority to award the fees: "Any compensation awarded for the preparation of a fee application shall be based on the level and skill

reasonably required to prepare the application." 11 U.S.C. § 330(a)(6). The provision, therefore, confirms that the general provisions of § 330 permit fees for the preparation of a fee application. This conclusion undermines the Fifth Circuit's fundamental argument against allowing fees for the defense of a fee application, that § 330(a)(4)(A) prohibits the fees because "[t]he primary beneficiary of a professional fee application is the professional." *In re ASARCO, L.L.C.*, 751 F.3d 291, 299 (5th Cir. 2014). The Fifth Circuit's interpretation would preclude the award of fees for the preparation of a fee application that § 330 clearly permits.

The NACTT, however, also emphasizes the limits of the case before the Court. Section 330(a)(4)(A) applies "[e]xcept as provided in" § 330(a)(4)(B). 11 U.S.C. § 330(a)(4)(A); *see also In re Smith*, 317 F.3d 918, 926 (9th Cir. 2002) ("*[E]xcept for fee awards in Chapter 12 and 13 cases*, the new provision applies to *all* awards of reasonable compensation." (first emphasis added)). Section 330(a)(4)(B) provides authority to award "reasonable compensation to the debtor's attorney" in chapter 13 cases (and chapter 12 cases filed by individuals) "for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section." 11 U.S.C. § 330(a)(4)(B). Courts award debtors' attorneys' fees in chapter 13 cases pursuant to this provision, not § 330(a)(1), which does not authorize compensation to attorneys except attorneys employed to represent the trustee under

§ 327. *See Lamie v. U.S. Trustee*, 540 U.S. 526, 534-35 (2004). A holding in this case, therefore, that § 330(a)(4)(A) prohibits an award of fees for the defense of fees would not directly preclude an award of similar fees to a debtor's attorney in a chapter 13 case because § 330(a)(4)(B) limits the effect of the restrictions in § 330(a)(4)(A). Section 330(a)(4)(B) also provides additional support for the award of compensation for the defense of a debtor's attorney's fees in individual chapter 12 and chapter 13 cases. Because the provision authorizes compensation for representing the interests of the debtor, and because the debtor may be responsible for any fees not paid from the estate, the debtor's attorney may be "representing the interests of the debtor," 11 U.S.C. § 330(a)(4)(B), in defending the core fee application.

II. Permitting compensation for reasonable litigation of fee applications in bankruptcy is consistent with the clear goals of § 330

The goals of § 330 support awarding fees for reasonable litigation of fee applications in bankruptcy. As the petitioner explains in detail, § 330 represents a clear policy departure from the "economy of the estate" approach that existed prior to the 1978 Bankruptcy Act, which required attorneys in bankruptcy cases to accept less in bankruptcy cases than they would receive for similar services in other fields. Section 330, instead, aims "to ensure competent representation of debtors by requiring compensation of 'attorneys and other professionals serving in a case

under Title 11 at the same rate as the attorney or other professional would be compensated for performing comparable services' in non-bankruptcy cases." *In re Nucorp Energy, Inc.*, 764 F.2d 655, 658 (9th Cir. 1985) (quoting 124 Cong. Rec. H32, 394 (1978)). *See generally* Timothy S. Springer, *Damned If You Do, Damned If You Don't – Current Issues for Professionals Seeking Compensation in Bankruptcy Cases Under 11 U.S.C. § 330*, 87 Am. Bankr. L.J. 525, 529 (2013). Especially with respect to § 330(a)(4)(B), which authorizes compensation for attorneys representing the interests of individual chapter 12 and chapter 13 debtors, the goals of the statute are also similar to the goals of fee-shifting provisions in consumer protection and civil rights statutes – to address concerns that the cost of counsel would prevent important access to the court system. *See, e.g.*, *Kay v. Ehrler*, 499 U.S. 432, 436 (1991) ("Although [42 U.S.C. § 1988] was no doubt intended to encourage litigation protecting civil rights, it is also true that its more specific purpose was to enable potential plaintiffs to obtain the assistance of competent counsel in vindicating their rights.").

The compensation process under § 330 is a process that has no direct counterpart in non-bankruptcy law. Categorically denying compensation for the fees incurred in this bankruptcy-specific process would dilute bankruptcy fees relative to non-bankruptcy fees. The fees for litigating a fee application are not analogous to the fees a non-bankruptcy professional would incur in suing a client that refused to pay a

bill. A lawsuit to collect a billed amount is a suit to enforce an existing contract. The court's role in this process is primarily to determine the terms of the contract and the parties' performance under the terms. A court reviewing a fee application, in contrast, has the discretion to adjust compensation based on issues that the parties decide non-judicially in the non-bankruptcy context, issues like the reasonableness of the compensation and whether the services involved are beneficial or necessary. *See* 11 U.S.C. § 330(a)(1)(A), (4)(B).

Denying compensation for the reasonable fees of litigating a fee application provides objecting parties undue leverage. It "would allow a litigious objecting party to negotiate unwarranted reductions in a fee award simply because the attorney is faced with a no win situation: even if the attorney fights the objection and prevails, the time and resources spent on the issue often will outweigh the value of the amount in dispute." *Boyd v. Engman*, 404 B.R. 467, 483 (W.D. Mich. 2009). Chapter 13 cases present a unique concern because § 330(a)(4)(B) permits a debtor's attorney to receive fees from the estate for representing the *debtor's* interests (in litigation over exemptions or dischargeability, for example). *See* Keith M. Lundin & William H. Brown, *Chapter 13 Bankruptcy* § 294.1, at ¶¶ 9-10 (4th ed., sec. rev. June 17, 2004), www.Ch13online.com. Providing creditors in chapter 13 cases a unilateral ability to impose fee reductions on debtors' attorneys would present a destabilizing threat to the attorneys' independence.

The approach of permitting courts to award fees for the reasonable costs of litigating fee applications, the approach implicit in § 330, presents less opportunity for abuse and gamesmanship than the alternative. Any compensation ultimately awarded for fees incurred in litigating a fee application is subject to scrutiny by interested parties and court review. As with the process this Court considered in *Commissioner, INS v. Jean*, "no award of fees is 'automatic'" under § 330. 496 U.S. 154, 163 (1990). The § 330 process, therefore, does not create a meaningful incentive to make unreasonable fee requests – the costs of unreasonable or unnecessary litigation of fee applications are not compensable under any theory. The alternative approach involves much less oversight. If the costs of litigating fee applications were categorically non-compensable, then the only check on coercive practices by objecting parties would be Rule 9011 of the Federal Rules of Bankruptcy Procedure and the courts' inherent authority to shift fees when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. These protections are likely to be under-inclusive. They place the burden on the party or the court asserting misconduct, and the protections involve substantial uncertainty. Objecting parties subject to these restrictions alone would almost certainly retain undue leverage in the significant gray area surrounding these extraordinary sanctions. Further, the protections apply under either approach. Even if permitting compensation for the costs of reasonable fee litigation did create an opportunity for abuse, courts would have the same ability

to address the behavior under these powers as they would have to address abuses by fee objectors.

III. Routine diminution of attorney's fees would threaten the chapter 13 bankruptcy system

Large business bankruptcy cases, like the case that gives rise to the issues before the Court, represent only a small percentage of bankruptcy filings,[2] and the economics of consumer bankruptcy cases are substantially different than the economics of large business bankruptcy cases. The NACTT urges the Court to interpret § 330 with a recognition of the consumer cases that make up the vast majority of bankruptcy filings.

In the chapter 13 cases that the NACTT member trustees administer, attorney's fees never approach the scale of the fees in this case, but the fees are equally important. Qualified attorneys are vital to the chapter 13 system. The chapter 13 process is

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[2] Cases involving primarily consumer debts far outnumber all cases involving primarily business debts, large and small. For the 12-month period ending September 30, 2014, the Administrative Office of the U.S. Courts reports a total of 935,420 non-business bankruptcy filings (including 623,349 under chapter 7; 1,154 under chapter 11; and 310,914 under chapter 13), compared to only 28,319 business filings. *See* Administrative Office of the U.S. Courts, *Table F-2: U.S. Bankruptcy Courts – Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending September 30, 2014, available at* http://www.uscourts.gov/Statistics/BankruptcyStatistics/2014-bankruptcy-filings.aspx.

extremely difficult to navigate without the assistance of an experienced attorney, and the system functions properly only with the participation of specialized attorneys. The limitations on the funds available to compensate attorneys in these cases, however, already strain the system. Any shift that categorically reduces the fees actually earned by competent counsel presents a threat.

A. An effective and efficient chapter 13 bankruptcy system demands qualified debtors' attorneys

Consumer bankruptcy represents a surprisingly complex area of law. The National Bankruptcy Review Commission concluded in 1997 that "[n]o area of bankruptcy law is more complex than consumer bankruptcy." National Bankruptcy Review Commission, *Bankruptcy: the Next Twenty Years* 79 (1997), *quoted in* Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 Am. Bankr. Inst. L. Rev. 17, 32 (2012) [hereinafter *Consumer Bankruptcy Fee Study*]; *see also* Elizabeth Warren, *A Principled Approach to Consumer Bankruptcy*, 71 Am. Bankr. L.J. 483, 494-95 (1997) ("A strong case could be made that the consumer bankruptcy system has outstripped the business bankruptcy system in twists, turns, and complications."). Chapter 13 cases are among the most challenging consumer bankruptcy cases. *See, e.g.*, Joan Feeney et al., *Bankruptcy Law Manual* § 13.5 (5th ed. 2014). The amendments to the Bankruptcy Code in the Bankruptcy Abuse Prevention

and Consumer Protection Act of 2005 ("BAPCPA") only added to this complexity. *See, e.g.*, Lundin & Brown, *supra*, § 387.1, at ¶ 1 (sec. rev. July 3, 2007) (describing the "many new duties" BAPCPA imposed on Chapter 13 debtors, "including many new and changed filing requirements," and noting that some of the new requirements "were scattered to various chapters and sections, not always with any obvious logic").

A competent, compensated attorney to represent the debtor is a necessity in a chapter 13 case. Success rates for unrepresented debtors in chapter 13 cases are dismal. *See* U.S. Bankruptcy Court for the Central District of California, *Access to Justice in Crisis: Self-Represented Parties and the Court* 5 (2011) ("The number of self-represented debtors that manage to get to confirmation of a chapter 13 plan is 0.4 percent – clearly demonstrating that it is nearly impossible for this population to succeed in chapter 13."), *available at* http://ecf-ciao.cacb.uscourts.gov/Communications/prose/annualreport/2011/sectioniib.htm; *see also Consumer Bankruptcy Fee Study*, *supra*, at 81 (reporting that only "0.8% of all chapter 13 cases filed post-BAPCPA that ended with the debtor receiving a discharge were filed *pro se*"). Effective debtors' attorneys benefit not only the debtors, but the entire system; unrepresented parties severely slow down a process that demands efficiency. *See* Lundin & Brown, *supra*, § 93.1, at ¶ 1 (sec. rev. May 24, 2004) ("Pro se Chapter 13 cases are almost always a nightmare for creditors, for the trustee and for the court.").

Chapter 13 cases frequently involve litigation or professional services at various points throughout the case. In many instances, the debtors (or the estate, *see, e.g.*, *Rugiero v. Nationstar Mortg., LLC*, 580 Fed. App'x 376, 378 (6th Cir. 2014)) need representation in non-bankruptcy matters. The chapter 13 estate includes not only any cause of action or lawsuit held by the debtor at filing, *see* 11 U.S.C. § 541(a)(1), but also any such interests acquired during the case, *see* 11 U.S.C. § 1306(a)(1). The length of chapter 13 cases – generally between three and five years, *see* 11 U.S.C. §§ 1322(d), 1325(b)(4) – means that the court approval of compensation under § 330 affects the availability of counsel and professionals for many related matters. Successful resolution of these matters often benefits not only the debtors but their estates. The possibility of systemic dilution of the fees for these services presents a threat to the availability of qualified counsel and professionals.

B. Resource limitations in consumer cases necessitate high-volume practices with low margins and low fees

Despite the complexity of chapter 13 practice, attorneys' fees in chapter 13 cases are generally "modest." Lundin & Brown, *supra*, § 24.1, at ¶ 2 (sec. rev. Mar. 30, 2009). Debtors have limited funds to commit to payment of attorneys, and even the awarded fees are subject to the "unspoken truth that debtors' attorneys rarely collect 100 percent of their fees in Chapter 13 cases." Lundin & Brown, *supra*,

§ 294.1, at ¶ 25 (sec. rev. June 17, 2004). The demands create a pull toward the bankruptcy "mill" model that overemphasizes case volume over quality of representation. *See* Todd J. Zywicki, *An Economic Analysis of the Consumer Bankruptcy Crisis*, 99 Nw. U. L. Rev. 1463, 1531 (2005). Even for the best consumer bankruptcy attorneys, however, efficiency in case management is critical. *See Consumer Bankruptcy Fee Study*, *supra*, at 122 ("Efficiency coupled with a high level of skill, while important in every area of law practice, is crucial to the success of a consumer bankruptcy practice."). The nature of this practice requires relatively high case volumes combined with relatively low fees and low per-case profit margins.

The court below analyzed § 330 primarily through the lens of the large chapter 11 case before it. The court dismissed concerns about fee dilution by noting that the defense fees in the case, though large in absolute terms, amounted to only about 4.4% of the core fees. *In re ASARCO, L.L.C.*, 751 F.3d at 301. In the relatively low-margin consumer bankruptcy context, however, even small percentage reductions in gross revenues can have a significant effect on profitability. In the consumer bankruptcy context, moreover, the absolute fee amounts are much smaller. With typical fee requests measured in thousands, not millions, of dollars,[3] the costs of litigating a fee

[3] The *Consumer Bankruptcy Fee Study* found that the average attorney's fees in post-BAPCPA chapter 13 cases were

(Continued on following page)

dispute in connection with a consumer bankruptcy case are very likely to represent a much larger percentage of the core fee than the 4.4% in this case.

Consumer bankruptcy attorneys are also likely to be especially affected by fee dilution. Because of the efficiency required in a complex area of law, the consumer bankruptcy practice, especially chapter 13 practice, demands specialization. *See* Lundin & Brown, *supra*, § 294.1, at ¶ 24 (sec. rev. June 17, 2004) ("Some of the best Chapter 13 debtors' attorneys operate computerized offices with specialized paralegals who manage a large volume of Chapter 13 cases very efficiently."). Further, many consumer bankruptcy attorneys work in offices that focus narrowly on consumer bankruptcy cases. *See, e.g.*, *Consumer Bankruptcy Fee Study* at 93. For these attorneys, a reduction in fees from bankruptcy cases largely translates into a reduction in their total income. The result is that fee dilution harms the very practices that the system needs most – practices that make the investment necessary to specialize in consumer bankruptcy.

$1,491 in dismissed cases and $2,564 in cases that resulted in a discharge. Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 Am. Bankr. Inst. L. Rev. 17, 56-57 (2012)

CONCLUSION

For the foregoing reasons, the NACTT requests that the Court reverse the decision of the Court of Appeals.

Respectfully submitted,

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IN THE

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BAKER BOTTS L.L.P. AND JORDAN, HYDEN, WOMBLE, CULBRETH & HOLZER, P.C.,

Petitioners,

v.

ASARCO L.L.C.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF THE PETITIONERS, BAKER BOTTS L.L.P. ET AL.

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	1
ARGUMENT	5
I. THE FIFTH CIRCUIT'S DECISION IS INCONSISTENT WITH THE CENTRAL MANDATE OF BANKRUPTCY CODE § 330, WHICH REQUIRES COMPARABLE LEGAL FEES FOR BANKRUPTCY AND NON-BANKRUPTCY WORK	5
A. Section 330 Of The Code Requires That Bankruptcy Lawyers Be Compensated At Rates Comparable To Non-Bankruptcy Lawyers	5
B. The Fifth Circuit Decision Should Be Reversed Because Reasonable Legal Fees For Defending A Fee Application May Be Permitted In Order For Attorneys' Fees To Be "Comparable" To Fees Charged In Non-Bankruptcy Cases.	9
II. THE FIFTH CIRCUIT DECISION SHOULD BE REVERSED BECAUSE IT IMPROPERLY BASED ITS DECISION ON AN UNJUSTIFIED AND UNPROVED "CONSPIRACY OF SILENCE" AND "PERVERSE INCENTIVES."	15
CONCLUSION	18

TABLE OF AUTHORITIES

Page(s)

CASES

Grant v. *George Schuman Tire & Battery Co.*, 908 F.2d 874 (11th Cir. 1990)..... 10
Hamilton v. *Lanning*, 560 U.S. 505 (2010) 1
In re ASARCO, L.L.C., 751 F.3d 291 (5th Cir.), *cert. granted*, 135 S. Ct. 44 (2014)..... 9, 10, 11, 15
In re Consol. Bancshares, Inc., 785 F.2d 1249 (5th Cir. 1986)..... 15
In re Nucorp Energy, Inc., 764 F.2d 655 (9th Cir. 1985)..... 6, 9, 10
In re Top Grade Sausage, Inc., 227 F.3d 123 (3d Cir. 2000), *abrogated by Lamie* v. *U.S. Tr.*, 540 U.S. 526 (2004)..... 8
In re Wind N' Wave, 509 F.3d 938 (9th Cir. 2007)..... 10
Lamie v. *U.S. Tr.*, 540 U.S. 526 (2004)..... 1, 8
Mort Ranta v. *Gorman*, 721 F.3d 241 (4th Cir. 2013)..... 1
United Student Aid Funds, Inc. v. *Espinosa*, 559 U.S. 260 (2010)..... 1
Weber v. *SEFCU*, 719 F.3d 72 (2d Cir. 2013)..... 1

STATUTES

11 U.S.C. § 101 et. seq..... 2
11 U.S.C. § 330(a)..... 2, 5, 7, 8, 10
11 U.S.C. § 1301 et. seq..... 3
11 U.S.C. § 1302..... 13

TABLE OF AUTHORITIES—continued

Page(s)

OTHER AUTHORITIES

§ 23:684. Generally, 2D Bankr. Service L. Ed. § 23:684 8

Collier on Bankruptcy (Alan N. Resnick & Henry J. Sommer eds., 16th Ed.) 8

G. Ray Warner, *American Bankruptcy Institute National Report on Professional Compensation in Bankruptcy Cases* (LRP Publications 1991)..... 2, 4, 6,7, 14, 16, 17

H.R. Rep. No. 95-595, 330 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5963. 6

Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 Am. Bankr. Inst. L. Rev. 17 (2012)..... 4, 11, 12, 13, 14, 16

Scott F. Norberg & Nadja Schreiber Compo, *Report on an Empirical Study of District Variations, and the Roles of Judges, Trustees and Debtors' Attorneys in Chapter 13 Bankruptcy Cases*, 81 Am. Bankr. L.J. 431 (2007) 2, 3

Timothy S. Springer, *Damned If You Do, Damned If You Don't—Current Issues for Professionals Seeking Compensation in Bankruptcy Cases Under 11 U.S.C. § 330*, 87 Am. Bankr. L.J. 525 (2013)..... 7

United States Courts, *Table F-2: U.S. Bankruptcy Courts—Business and Non-business Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending June 30, 2014* (2014), *available at* http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2014/0614_f2.pdf 3

INTEREST OF *AMICUS CURIAE*[1]

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys [NACBA] is a non-profit organization with a membership of more than 3,000 consumer bankruptcy attorneys nationwide. NACBA's mission includes educating the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues its individual member attorneys cannot adequately address. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors. NACBA has filed *amicus curiae* briefs in various courts on behalf of consumer bankruptcy debtors. See, *e.g.*, *Lamie* v. *U.S. Tr.*, 540 U.S. 526 (2004) (discussing § 330); *Hamilton* v. *Lanning*, 560 U.S. 505 (2010); *United Student Aid Funds, Inc.* v. *Espinosa*, 559 U.S. 260 (2010); *Mort Ranta* v. *Gorman*, 721 F.3d 241 (4th Cir. 2013); *Weber* v. *SEFCU*, 719 F.3d 72 (2d Cir. 2013).

SUMMARY OF ARGUMENT

A significant risk to the functioning of the bankruptcy system is the lack of fair compensation

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Petitioners Baker Botts L.L.P., et al. filed blanket consent to the filing of *amicus curiae* briefs, which was docketed on October 8, 2014. Respondent ASARCO L.L.C. has consented to the filing of this brief, and a letter reflecting its consent was filed contemporaneously with this brief.

for attorneys who are compensated by the bankruptcy estate.[2] For several decades, Congress, the courts, and commentators have criticized the lack of comparability and parity to those who work in other legal areas. See generally, G. Ray Warner, *American Bankruptcy Institute National Report on Professional Compensation in Bankruptcy Cases* 3 (LRP Publications 1991) [hereinafter ABI Fee Study]. The problem is serious and systemic. Empirical data has shown that, as a result of the lack of parity, lawyers have declined to work in this area, have turned down important legal tasks because of the fee risks, and experts have expressed concerns that the field was not attracting lawyers of sufficient competency. *Id.* at 136 (noting that in some cases "competent practitioners are moving away from debtor work" and "estate work may not be 'command[ing] the same competency of counsel as other cases'" (quoting 124 Cong. Rec. H11,091-2 (daily ed. Sept. 28, 1978))).

The proper functioning of the bankruptcy system is important for individual debtors, creditors, and the national economy. In some years, creditors have received distributions of over $5 billion in Chapter 13 cases. Scott F. Norberg & Nadja Schreiber Compo, *Report on an Empirical Study of District Variations, and the Roles of Judges, Trustees and Debtors' Attorneys in Chapter 13 Bankruptcy Cases*, 81 Am.

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[2] *See, e.g.*, 11 U.S.C. § 101 et. seq. [hereinafter the Code]. Section 330(a)(4)(B) (discussed in Section I, below) permits a court to award compensation by the estate to attorneys hired by a Chapter 13 debtor. This section provides for a more liberal standard, stating that, in addition to the criteria set forth in § 330(a), the court may award reasonable compensation based on benefit and necessity of the services to the debtor. The test of what is reasonable includes the same "comparability" standard as in other cases.

Bankr. L.J. 431, 431 (2007).[3] Studies have shown that the uneven application of the Code (as well as variations among the courts) have large economic and social impacts. *Id.* at 431-32. In many cases, home ownership is at stake: "[T]he large majority of debtors used Chapter 13 primarily to address mortgage defaults " *Id.* at 469.

NACBA is filing this *amicus* brief because the decision by the Fifth Circuit will make this problem more acute and because the impact is more severe among those who practice in the consumer area, including Chapter 13.[4] Of the slightly more than one million bankruptcy filings in 2014, 999,254 were either Chapter 7 or Chapter 13 cases on behalf of individual debtors.[5] Over 300,000 cases were Chapter 13 cases involving individual debtors, the vast majority of whom were consumers. Fees received by counsel in Chapter 13 cases are extremely

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[3] While distributions to creditors vary considerably between the circuits, in the District of Maryland and the Southern District of Georgia, a substantial number of plans proposed payment of 100%. In other jurisdictions, the norm is around 40%, although lower distributions occur in some jurisdictions. Norberg & Compo, *supra*, at 455.

[4] Chapter 13 is designed to provide for the adjustment of debts of an individual with regular income. See 11 U.S.C. § 1301 et. seq. Chapter 7 is for the collection and liquidation of assets. Chapter 11 relates to larger financial reorganizations.

[5] The number of consumer cases eclipsed the number of Chapter 11 cases by a factor of more than 38. There were 321,278 Chapter 13 cases during this period, but only 8,347 Chapter 11 cases. United States Courts, *Table F-2: U.S. Bankruptcy Courts—Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending June 30, 2014* (2014), *available at* http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2014/0614_f2.pdf.

low, resulting in a "disconnect between the skill, time, and commitment it takes for attorneys to provide debtors with first-rate representation, and compensation that does not always reflect such excellence." Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 Am. Bankr. Inst. L. Rev. 17, 123 (2012) [hereinafter Lupica]. [6]

This brief addresses two issues of particular significance to this *amicus* and its members who represent debtors under Chapter 13 of the Bankruptcy Code, but also other professionals in consumer cases.[7] First, the Fifth Circuit's ruling will cause serious harm to consumer bankruptcy lawyers and exacerbate the continued inability to receive comparable pay, despite the mandate of § 330.

The second issue addressed by this *amicus* is the Fifth Circuit's reliance on what it termed "perverse incentives," and a "conspiracy of silence" to justify denial of the payment of defense costs. The Fifth Circuit's view of the bankruptcy bar is unsupported by the factual record and contradicted by empirical data.[8] Moreover, the likelihood that collusion would ever occur in the average Chapter 13 case is minimal

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[6] *See generally*, Lupica, *supra*, at 110. Professor Lupica described an important "disunion between (i) complexity of the consumer bankruptcy system, (ii) the experience and resources needed to represent debtors through an often byzantine maze, and (iii) the dearth of resources available to pay for this representation." *Id.* at 121.

[7] NACBA members include attorneys who practice in both the Chapter 7 and Chapter 13 arena and who primarily represent consumer debtors, counsel to the Chapter 7 Trustee, special counsel appointed in a Chapter 7 case, and other parties in cases involving small amounts of money.

[8] *See generally*, the ABI Fee Study, *supra* (describing among other things the active and vigilant supervision of attorney fees).

because there is virtually no other party with whom debtor's counsel can engage in the so-called "conspiracy of silence." The only principal party is the Chapter 13 Trustee, who is almost always an adversary in fee litigation. The Fifth Circuit's decision, therefore, penalizes consumer lawyers in an effort to avert a threat that simply does not exist.

ARGUMENT

I. THE FIFTH CIRCUIT'S DECISION IS INCONSISTENT WITH THE CENTRAL MANDATE OF BANKRUPTCY CODE § 330, WHICH REQUIRES COMPARABLE LEGAL FEES FOR BANKRUPTCY AND NON-BANKRUPTCY WORK.

A. Section 330 Of The Code Requires That Bankruptcy Lawyers Be Compensated At Rates Comparable To Non-Bankruptcy Lawyers.

Section 330(a) of the Bankruptcy Code provides that lawyers who render "necessary services" that either benefit the debtor's estate or the administration of the estate, must be compensated at rates "comparable" to attorneys serving in non-bankruptcy areas. 11 U.S.C. § 330(a). A principal purpose of § 330(a) in the Bankruptcy Code, as enacted in 1978, was to abolish the "economy of the estate" doctrine:

> The effect of the last provision [section 330's requirement that compensation be commensurate with that awarded in non-bankruptcy cases] is to overrule *In re Beverly Crest Convalescent Hospital, Inc.*, 548 F.2d 817 (9th Cir. 1976, as amended 1977), which set an arbitrary limit on fees payable, and other, similar cases that require fees

> to be determined based on notions of conservation of the estate and economy of administration.

H.R. Rep. No. 95-595, 330 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5963, 6286. See also *In re Nucorp Energy, Inc.*, 764 F.2d 655, 658 (9th Cir. 1985) ("In particular, Congress sought to repudiate a series of judicial decisions which had held that the compensation of attorneys in bankruptcy proceedings was subject to the overriding concern, unique to bankruptcy cases, of preserving the estate.").

Congress recognized the immutable link between comparable pay and efficient operation of the bankruptcy system. The 1978 Code "ensure[d] adequate compensation for bankruptcy attorneys so that highly qualified specialists would not be forced to abandon the practice of bankruptcy law in favor of more remunerative kinds of legal work." *Id.* at 658. The absence of comparable pay was seen as detrimental to the smooth operation of the bankruptcy system: "Bankruptcy specialists, however, if required to accept fees in all of their cases that are consistently lower than fees they could receive elsewhere, will not remain in the bankruptcy field." H.R. Rep. No. 95-595, at 330.

Following the 1978 reforms, fees in consumer bankruptcy cases continued to lag. In 1991, the American Bankruptcy Institute [ABI] conducted a detailed study of legal fees. The ABI observed a "high level of vigilance on the issue of professional compensation" and found that fee objections were common. See ABI Fee Study, *supra*, at 3 ("The relatively high rate of fee objections reported by survey respondents indicates that overall a good deal of policing is occurring."). Yet, in some categories, at least half of the objections were meritless. See *id.* at 67 ("Among the lawyers, 59 percent of the

respondents reported that objections by the United States Trustee to professional fee applications are denied 50 percent or more of the time and 33 percent reported a denial rate of 75 percent or more."). In general, the ABI concluded that "fee rulings by the bankruptcy courts are having a net effect of undermining the Code's comparable services standard."[9] The ABI labeled the frequent fee disputes "an expensive sideshow distracting the professionals from the more important task of administering bankruptcy estates in an efficient manner." *Id.* at 3. Many surveyed attorneys reported that they had declined to do work for the bankruptcy estate because of the fee rulings. See *id.* at 136.

In 1994, Congress made it mandatory under § 330(a)(3) for courts to consider "customary compensation charged by comparably skilled practitioners." 11 U.S.C. § 330(a)(3).[10] Congress also required courts to determine whether fees were

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[9] ABI Fee Study, *supra*, at 3; *see also id.* at 21 ("Although the data are mixed and further research is indicated, there is some evidence that bankruptcy lawyers may be receiving less compensation than their peers in non-bankruptcy fields." The demographics of the respondents for the ABI Fee Study included attorneys, judges, and trustees who were actively involved in Chapter 7, Chapter 11, Chapter 12 and Chapter 13 work. "Chapter 13 work accounted for at least 10 percent of the practice of 31 percent of the respondents and at least 50 percent of the practice of 4 percent of the respondents.").

[10] "[C]onsideration of the factors set forth in § 330(a)(3) is mandatory." Timothy S. Springer, *Damned If You Do, Damned If You Don't—Current Issues for Professionals Seeking Compensation in Bankruptcy Cases Under 11 U.S.C. § 330*, 87 Am. Bankr. L.J. 525, 534 (2013).

necessary to the "administration of the case," as opposed to merely beneficial to the estate.[11]

Section 330(a)(4)(B), which permits attorney's fees in individual Chapter 13 cases "based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section," was also added in 1994. 11 U.S.C. § 330(a)(4)(B). This provision is more expansive than that applicable to Chapters 7 and 11 and permits fee awards in Chapter 13 cases even without a showing of benefit to the estate or the administration of the case.[12] As this Court noted, "[s]ince the amendment's deletion of 'or the debtors *[sic]* attorney' from the original proposed draft affected Chapter 12 and 13 debtors' attorneys as much as Chapter 7 debtors' attorneys, § 330(a)(4)(B) shows a special intent to authorize the formers' fee awards in the face of the new, broad exclusion." *Lamie*, 540 U.S. at 540-41.

Both before and after the enactment of the above amendments, a majority of courts have held that it would be inequitable and inconsistent with § 330 to

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[11] The 1994 Amendments also limited the application of § 330(a) to attorneys who are retained to represent the "estate" under 11 U.S.C. § 327. *See Lamie*, 540 U.S. at 534 ("A debtor's attorney not engaged as provided by § 327 is simply not included within the class of persons eligible for compensation.").

[12] *See Collier on Bankruptcy* ¶ 330.02[3][b] (Alan N. Resnick & Henry J. Sommer eds., 16th Ed.); § 23:684. Generally, 2D Bankr. Service L. Ed. § 23:684 ("Chapter 13 debtor's counsel is entitled to administrative expense for compensation for work which is beneficial and necessary to debtor, without proof of benefit or necessity to Chapter 13 estate or creditors." (citing *In re Argento*, 282 B.R. 108 (Bankr. D. Mass. 2002))); *see also In re Top Grade Sausage, Inc.*, 227 F.3d 123, 130 (3d Cir. 2000), *abrogated by Lamie*, 540 U.S. 526 ("Section 330(a)(4)(B) sets forth a more liberal standard for attorneys representing individual debtors in a Chapter 12 or 13 bankruptcy proceeding.").

impose complex requirements on lawyers to obtain a fee, "while simultaneously denying compensation for the efforts necessary to comply with those requirements." *In re Nucorp Energy, Inc.*, 764 F.2d at 659 (permitting compensation for preparing and "presenting" the fee application).[13] The court in *Nucorp* further held, "[i]t would be unduly penurious to require such an accounting without granting reasonable compensation." *Id.* (quoting *Rose Pass Mines, Inc.* v. *Howard*, 615 F.2d 1088, 1093 (5th Cir. 1980) (per curiam)) (internal quotation marks omitted).

The Fifth Circuit's decision effectively reimposed the "economy of the estate" doctrine. The court looked mostly to the "cost" being added to the estate, while paying insufficient attention to the issue of comparability. The court disregarded the congressional mandate by rejecting the fee application which the bankruptcy court had found complied with the standard of comparability.[14]

B. The Fifth Circuit Decision Should Be Reversed Because Reasonable Legal Fees For Defending A Fee Application May Be Permitted In Order For Attorney's Fees To Be "Comparable" To Fees Charged In Non-Bankruptcy Cases.

Section 330(a)(3) states that in determining the amount of reasonable compensation, a court "shall

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[13] *See* Br. Pet'r 13 (describing the "vast majority" of courts which support this view).

[14] The court only found that comparability was in the "eye of the beholder" and gave no basis to suggest that it disagreed with the determination of comparability in the district court's decision. *In re ASARCO, L.L.C.*, 751 F.3d 291, 301 (5th Cir.), *cert. granted*, 135 S. Ct. 44 (2014).

consider" various factors, including, the "customary compensation charged by comparably skilled practitioners in cases other than under this title." 11 U.S.C. § 330(a)(3)(F). Bankruptcy courts have broad discretion in determining the award of fees. See *Grant* v. *George Schuman Tire & Battery Co.*, 908 F.2d 874, 878 (11th Cir. 1990) ("Bankruptcy judges and district courts have broad discretion in determining attorney's fees for bankruptcy proceedings; the exercise of that discretion will not be disturbed absent abuse of discretion."). A refusal to compensate for time spent defending a fee application has been found to be an abuse of discretion requiring reversal for failure to comply with the congressional mandate of comparability.[15]

The Fifth Circuit effectively stripped the bankruptcy courts of the discretion and paid insufficient heed to the requirement to consider comparability. It held, "[t]he claim for comparability is easily made but difficult to analyze."[16] *In re*

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[15] *See In re Nucorp Energy, Inc.*, 764 F.3d at 662 ("[A] refusal to award compensation for the time spent preparing or litigating fee applications results in a reduction of the rate paid for all the attorneys' services. Were we to affirm the district court's decision, we would in effect, be reducing the fees that bankruptcy counsel may earn to a level that fails to provide full compensation for their services."); *see also, In re Wind N' Wave*, 509 F.3d 938, 943 (9th Cir. 2007) ("[L]itigation over a fee award should [] be compensable, otherwise fee awards would be diluted . . . Dilution is 'precisely the result that statutory fee award provisions are designed to prevent.'" (quoting *In re Nucorp Energy, Inc.*, 764 F.2d at 661)).

[16] The Fifth Circuit also stated, "The Bankruptcy Code plainly intended to erase the 'economy of the estate' rule under pre-existing law and thus *raise* the professional fees." *In re ASARCO, L.L.C.*, 751 F.3d at 301 (emphasis added) (citing *In re Pilgrim's Pride Corp.*, 690 F.3d 650, 654-55 (5th Cir. 2012)).

ASARCO, L.L.C., 751 F.3d at 301. That difficulty in analysis apparently led the court to omit from its decision any basis to disturb the ruling of comparability implicit in the bankruptcy court decision.

The Fifth Circuit examined only whether the fees for *base services* passed the comparability test and failed to determine the impact of the 4.4 percent discount on the *overall fee award*. In holding that an imposition of a 4.4 percent reduction to an otherwise comparable fee was permitted, the Fifth Circuit sanctioned a discounted fee.

In its opinion, the court acknowledged that rejection of the fee application might cause the net award to deviate from the comparability standard, but offered little concern as to the net effect:

> Whether a deduction of [4.4 percent] renders the core fee non-comparable to charges by equally skilled practitioners in other types of legal practice is in the eye of the beholder.

Id. at 301.

The loss to the consumer lawyer is not in the eyes of the beholder, but is instead a concrete and objective economic loss of serious magnitude. The Fifth Circuit's seeming indifference to the impact of a fee discount will have a stark effect in consumer bankruptcy cases, and will expand an already large disparity with fees charged in other practice areas.

Professor Lois R. Lupica's study of the consumer bankruptcy system demonstrates that lawyers who work in the Chapter 13 field are already subject to enormous fee pressures. Lupica, *supra*, at 110. These pressures have an appreciable effect on the quality of legal services delivered and on the bankruptcy

system as a whole. The mean fee in a completed Chapter 13 case (*e.g.*, a case in which the debtor received a discharge after plan completion) was $2,564 for the period following the adoption of the Bankruptcy Abuse Prevention Consumer Protection Act [BAPCPA].[17] *Id.* at 57. However, the majority of Chapter 13 cases are either converted to Chapter 7 or dismissed. See *id.* at 55-56. The mean fee in a dismissed case is $1,491. *Id.*

In Chapter 13 practice, the starting point for calculating attorney's fees is usually the jurisdiction's presumptively reasonable rate, or what is known as the "no look fee."[18] No look fees, which typically do not require a fee application,[19] can range from $2,000 to $5,000; although the average fee in many districts is under $3,000. *Id.* at 115. Since the purpose of the no look fee arrangement is to increase case efficiency, it does not include the costs associated with filing a motion, representing a debtor in a contested matter,

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[17] BAPCPA was adopted in 2005, and the cited statistics refer to cases filed between October 17, 2005 and December 31, 2009. *See* Lupica, *supra*, at 51.

[18] In some jurisdictions, competent counsel consider the no look fee inadequate, and instead seek fees based on an hourly rate. Similarly, counsel may file a fee application based on hourly rates in more complex Chapter 13 cases requiring extraordinary amounts of work. These rates are also subject to downward pressures. *See id.* at 110 ("The median hourly rate reported by those responding attorneys who charge an hourly rate is $271. Note however, that this is the rate charged, not necessarily the rate ultimately received. In many instances, there is a significant divergence between the two.").

[19] *See id.* at 40 ("[The no look fee] is a dollar figure that, if charged by a lawyer in connection with his or her representation of a consumer debtor, will typically allow the lawyer to avoid the necessity of filing a fee application with the court.").

or bringing an "adversary proceeding."[20] In order to be compensated for these services, a consumer attorney would have to file a fee application. In many jurisdictions, attorneys decline to file fee applications as a matter of course, due to the lack of certainty in the outcome and high costs. See *id.* at 113 ("[T]he most frequent participants in the system are 'scared' to file the fee applications because they don't know what to expect and many comment that filing the application takes far longer than the fees incurred in many cases (and they can't seek payment for much of the time preparing the application) so they don't bother.").

The entire fee application process, including determining the no look fee, is under the close supervision of the Chapter 13 Trustee. Indeed, in a Chapter 13 case, the most dominant player is typically the Chapter 13 Trustee, who is appointed by the United States Trustee and invested with significant statutory powers over the administration of the case. See 11 U.S.C. § 1302.

Typically, in a Chapter 13 case, it is the Chapter 13 Trustee who is the principal objector to fees.[21] The

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[20] *See id.* at 112 ("[M]ost often, the debtor is charged the [no look fee] in a standard case, but if a complication arises, such as the filing of an adversary proceeding, the attorney may be entitled to either a fixed amount of additional compensation, or payment of an hourly rate for time spent."). The term, "adversary proceeding," can refer to a variety of proceedings within the larger bankruptcy case. A list of typical adversary proceedings is found in Bankruptcy Rule 7001; such proceedings generally follow the Federal Rules of Civil Procedure and are "trial like" and costly.

[21] If debtor's counsel cannot be compensated for fee litigation, then the Chapter 13 Trustee will be invested with more power

cost of defending a fee application can easily equal or exceed the time spent on the rest of the consumer bankruptcy case. If the Trustee is aware that the filing of a fee objection puts the debtor's counsel at risk of losing most or all of their fees, debtors' counsel may be likely to compromise their fee (even if not justified) and the entire goal of comparability will be lost. Thus, in the consumer case it is not 4.4 percent that is at stake, but something closer to 100 percent.

Professor Lupica reports that because of the high probability a case will be dismissed or converted, at least some Chapter 13 lawyers view themselves as taking cases on what is essentially a contingency basis, which "in turn, has a profound effect upon the quality of legal services delivered." Lupica, *supra*, at 119. Ultimately, these problems suggest that the parties who suffer are the debtors, because legal services may be withheld based purely on a combination of cost considerations and concern over the fee application process. See *id.* at 113. See also ABI Fee Study, *supra*, at 136 (finding that 43% of the attorneys surveyed "reported that fee rulings had altered their willingness to do estate work").

The real harm, however, is a systemic aversion by consumer bankruptcy attorneys to legal matters where fees are substantially threatened. Such an outcome would mean that consumer debtors, already at risk of being unable to find competent and affordable counsel, may be further denied experienced legal representation. The Fifth Circuit decision will only add to the uncertainty experienced by lawyers who seek reasonable fee awards, and thus

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and is likely to become the final arbiter over fees, thus stripping the court of its power.

is likely to provide negative incentives for competent counsel to practice consumer bankruptcy law.

The Fifth Circuit's decision, if not reversed, will threaten the chance that consumer debtors will receive adequate representation and that consumer debtor's attorneys will receive reasonable fees, comparable to those received by lawyers practicing in other areas of law.

II. THE FIFTH CIRCUIT DECISION SHOULD BE REVERSED BECAUSE IT IMPROPERLY BASED ITS DECISION ON AN UNJUSTIFIED AND UNPROVEN "CONSPIRACY OF SILENCE" AND "PERVERSE INCENTIVES."

The Fifth Circuit departed from a strict insistence on comparability based, in large measure, on a highly subjective view of attorneys and their supposed willingness to act improperly. The Fifth Circuit thought that "perverse incentives . could arise from paying the bankruptcy professionals to engage in satellite fee litigation [and] are easy to conceive." *In re ASARCO, L.L.C.*, 751 F.3d at 301. Reflecting a surprisingly dim view of lawyers who practice in this field, the Fifth Circuit expressed a concern that "[the parties will] enter into a conspiracy of silence with regard to contesting each other's fee application." *Id.* at 302 (quoting *In re Consol. Bancshares, Inc.*, 785 F.2d 1249, 1255 (5th Cir. 1986)) (internal quotation marks omitted).[22]

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[22] *In re Consol. Bancshares, Inc.*, 785 F.2d at 1255 ("Too frequently, court-appointed counsel for debtor and the official creditor committees' interests in a case, creditor committees' interests in a case, sharing the mutual goal of securing approval for their fees, enter into a conspiracy of silence with regard to contesting each other's fee applications.").

This argument is flawed. First and foremost, the alleged conspiracy of silence does not arise in the vast majority of consumer cases for the simple reason that there is typically no one with whom to conspire. There is no creditors' committee, which was the focus of the Fifth Circuit's concern in *Consolidated Bancshares*. Nor did the Fifth Circuit offer any suggestion that standing Chapter 13 Trustees, who hold substantial statutory powers over the case, conspire with debtors.[23] In fact, the Chapter 13 Trustee usually mounts a persistent and aggressive challenge to the fee application. See ABI Fee Study, *supra*, at 68 ("[T]he U.S. Trustee is a very active participant in the fee allowance process."). Moreover, bankruptcy courts vigorously scrutinize the legal fees in all bankruptcy cases, leaving little opportunity for any such conspiracy. See *id.* at 3 ("The survey data also suggest a high level of vigilance on the issue of professional compensation [and] a good deal of policing is occurring.").

Second, the record before the Fifth Circuit did not justify such a conclusion. Neither party requested it. The Fifth Circuit, of its own accord, appears to have launched an extraordinarily aggressive, if not viscous, attack on Baker Botts's fee application. Since they are purely conjecture, the Fifth Circuit's concerns regarding a conspiracy should be rejected.

Third, the scholarly and empirical evidence contradicts the Fifth Circuit's speculations. The ABI Fee Study established that most judges do not report

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[23] Lawyers for creditors typically do not represent debtors and, therefore, have no need for concern about aggressive challenges to fees. Similarly, most debtor lawyers limit their practice to the consumer side and have an incentive to avoid disputes with fellow lawyers. *See generally*, Lupica, *supra*, at 93.

this as a serious problem. See *id.* at 55 (acknowledging the Fifth Circuit's reference to a "conspiracy of silence" in *In re Consolidated Bancshares*, but finding that only 10% of the judges surveyed indicated this was one of their "'biggest problems'"). Moreover, the study showed that objections to legal fees—the opposite of a conspiracy of silence—occur frequently and are often meritless:

> Thus, it appears that attorneys show relatively little hesitation to attack the fee requests of their fellow professionals when it is in their client's interest to do so. If, in fact, there ever was a generally accepted taboo against fee objections, it may have disappeared with the bankruptcy rings.

ABI Fee Study, *supra*, at 59-60. [24] Thus, the Fifth Circuit decision will likely bring about more meritless objections to fee applications, as any objection, regardless of merit, will extract a high price from the consumer lawyer. Such an outcome would deal a massive blow to the congressional goal of comparability.

The Fifth Circuit's reliance on a conspiracy of silence was misguided, and casts a shadow on the bankruptcy bar, as a whole, and on lawyers who handle small, consumer cases, in particular. It should not be a basis for the deviation from the standard of comparability, which is of great importance to the consumer bankruptcy bar and to those who require the legal protection of Chapter 13.

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[24] The term, "bankruptcy ring," means "groups of attorneys in a few cities who had a virtual monopoly on the bankruptcy practice under the old Bankruptcy Act." ABI Fee Study, *supra*, at 60 n.40.

CONCLUSION

For the foregoing reasons, the decision of the Fifth Circuit should be reversed.

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IN THE

Supreme Court of the United States

BAKER BOTTS L.L.P. AND JORDAN, HYDEN, WOMBLE, CULBRETH & HOLZER, P.C.,

Petitioners,

v.

ASARCO LLC,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

AMICUS BRIEF OF NEUTRAL FEE EXAMINERS SUPPORTING NEITHER PARTY

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT 5

ARGUMENT 6

A. The Law Is Unsettled on Compensation for Defending Fee and Cost Objections. 7

B. 11 U.S.C. § 330 Provides a Statutory Basis for Awarding, After a Heightened Review, Limited Compensation for the Defense of a Challenged Fee Application 11

C. Any Award of Compensation for Defending a Challenged Fee Application Requires a Heightened Standard of Review. 13

D. The Practical Approach Developed in the *American Airlines* and *General Motors* Proceedings Provides Context for the Court's Decision Here 18

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

CCT Communications, No. 07-10210, 2010 WL 3386947 (Bankr. S.D.N.Y. Aug. 24, 2010) 19, 20

Commissioner, I.N.S. v. Jean, 496 U.S. 154 (1990) 25

Hensley v. Eckerhart, 461 U.S. 424 (1983) 24, 25

Hewitt v. Helms, 482 U.S. 755 (1987) 24

In re Ahead Commc'ns Sys., Inc., No. 02-30574, 2006 WL 2711752 (Bankr. D. Conn. Sept. 21, 2006) 9

In re ASARCO LLC, 751 F.3d 291 (5th Cir.), *cert. granted*, 135 S. Ct. 44 (2014) ..... 2, passim

In re Brous, 370 B.R. 563 (Bankr. S.D.N.Y. 2007) 8

In re Busy Beaver Bldg. Ctrs., Inc., 19 F.3d 833 (3d Cir. 1994) 7

In re Engel, 124 F.3d 567 (3d Cir. 1997) 20

In re Lehman Bros. Holdings Inc., No. 13-CIV-2211, 2014 WL 3408574 (S.D.N.Y. June 26, 2014) 19

In re Motors Liquidation Co., No. 09-50026, 2010 WL 285359 (Bankr. S.D.N.Y. Nov. 23, 2010) 19, 20, 22

In re Nucorp Energy, Inc., 764 F.2d 655 (9th Cir. 1985) 10

In re Parklex Assocs. Inc., 435 B.R. 195 (Bankr. S.D.N.Y. 2010) 9

In re Riverside-Linden Inv. Co., 945 F.2d 320 (9th Cir. 1991) 8, 9

In re Smith, 317 F.3d 918 (9th Cir. 2002) 7, 9, 10

In re St. Rita's Assocs. Private Placement, L.P., 260 B.R. 650 (Bankr. W.D.N.Y. 2001) 8, 9

In re Teraforce Tech. Corp., 347 B.R. 838 (Bankr. N.D. Tex. 2006) 8, 9

In re Wireless Telecomms., Inc., 449 B.R. 228 (Bankr. M.D. Pa. 2011) 8

In re Worldwide Direct, Inc., 334 B.R. 108 (D. Del. 2005) 9

Judicial Watch, Inc. v. F.B.I., 522 F.3d 364 (D.C. Cir. 2008) 26

Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978) 24

Painewebber Income Properties Three Ltd. P'ship v. Mobile Oil Corp., 916 F. Supp. 1239 (M.D. Fla. 1996) 24

Texas State Teachers Ass'n v. Garland Independent School Dist., 489 U.S. 782 (1976) 24

West Virginia Univ. Hosp., Inc. v. Casey, 499 U.S. 83 (1991) 23

Zarcon, Inc. v. N.L.R.B., 578 F.3d 892 (8th Cir. 2009) 26

STATUTES AND OTHER AUTHORITIES

11 U.S.C. §§ 327-330 2

11 U.S.C. § 327(a) 2

11 U.S.C. § 330 ..... 6, 11, 13, 15

11 U.S.C. § 330(a) 5

11 U.S.C. § 330(a)(1) 3

11 U.S.C. § 330(a)(3)(C) 11

11 U.S.C. § 330(a)(3)(F) 10, 15

11 U.S.C. § 330(a)(6) 7

11 U.S.C. § 362(k)(1) 11

11 U.S.C. § 503(b) 18

11 U.S.C. § 544 14

11 U.S.C. § 547 14

11 U.S.C. § 548 14

15 U.S.C. § 4304 26

28 U.S.C. § 586(a)(3)(A) 2

3 Collier on Bankruptcy (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2014) 7

5 U.S.C. § 552(a)(4)(E)(i) 26

5 U.S.C. § 552(a)(4)(E)(ii) 26

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005) 15

Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984) (codified at 11 U.S.C. § 330) 15

Bankruptcy Reform Act of 1978, Pub. L. No. 95–598, 92 Stat. 2549 (1978) 15

Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994) 15

Nancy B. Rapoport, *Rethinking Professional Fees in Chapter 11 Cases*, 5 J. Bus. & Tech. L. 263 (2010) 18

Stephen J. Lubben, *Corporate Reorganization & Professional Fees*, 82 Am. Bankr. L.J. 77 (2008) 18

RULES

Fed. R. Bankr. P. 2016 2

Fed. R. Bankr. P. 9014 14

INTEREST OF THE AMICI CURIAE

The amici curiae are practicing lawyers and law professors, without a financial stake in this appeal, who share the practical experience of U.S. Bankruptcy Court appointments to review the fees and costs of professional firms seeking compensation from the estate in large Chapter 11 proceedings. By definition neutral, they have provided detailed analysis of fee applications—and, on occasion, objected to them—to assist bankruptcy courts in fulfilling their responsibility under the U.S. Bankruptcy Code to review and approve professional compensation.

Specifically, the amici have analyzed professional fee applications—line by line—on an interim and on a final basis, making recommendations to the courts that appointed them. Fee examiners have a recognized role in the fee review process in some cases, whether fees have gone unchallenged by parties in interest or fees have been challenged, as they are here, through four courts and over 52 months. The amici support neither side in this appeal.[1]

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, the amici file this brief with the written consent of all parties. The petitioners' consent was given generally and noted on the docket on October 8, 2014. The respondent's consent came in a December 3, 2014 communication from its counsel. No counsel for a party wrote this brief in whole or in part. No person or entity other than the amici or his/her counsel made a monetary contribution for the submission of this brief; it has been prepared *pro bono*.

By all accounts, this has been and remains an "extraordinary" case—with the creditors paid in full, no taxpayer funds expended, the legal services provided "exceptional," and the Chapter 11 outcome a "once in a lifetime result."[2] Yet the amici and the country's 95 bankruptcy courts conduct themselves daily in the more ordinary business environment where creditors almost never are paid in full and the outcomes are rarely so satisfying despite the usually diligent efforts of the retained professionals. And the decision here will affect the ordinary Chapter 11 proceedings, including those involving fee objections and the defense of fees, no less than it will affect the parties here.

The Bankruptcy Code requires bankruptcy courts to review professional fees and expenses.[3] *See generally* 11 U.S.C. §§ 327-330. Congress also has mandated the involvement of U.S. Trustees in that process. 28 U.S.C. § 586(a)(3)(A). The Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and guidelines issued by the bankruptcy courts and the U.S. Trustees impose rigorous timekeeping and reporting standards on professionals. *E.g.*, Fed. R. Bankr. P. 2016. Those standards help ensure the integrity of the system and provide a basis for a

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[2] *Baker Botts L.L.P. v. ASARCO LLC*, 751 F.3d 291, 296-98 (5th Cir. 2014) (accepting the district court's "effusive evaluation of the results obtained").

[3] Although this case involves two law firms, referred to collectively in this brief as "Baker Botts," the Bankruptcy Code requires financial advisors, accounting firms and others to submit their fees and expenses for court review and approval. *See* 11 U.S.C. § 327(a).

court's determination that the professional fees are both reasonable and necessary under 11 U.S.C. § 330(a)(1).

Even with electronic data and filing now widely in use, those detailed reporting requirements impose a significant burden on the courts: daily narrative time records for hundreds and, in some proceedings, thousands of timekeepers fill thousands of pages and hundreds of thousands of lines. On occasion, usually by stipulation, the bankruptcy courts have utilized fee auditors, fee examiners, and fee committees to provide quantitative and qualitative analysis and recommendations. The amici here have provided those services in a series of Chapter 9 and 11 proceedings, *see* Petitioners' Brief at 48, and it is from that perspective that they submit this brief.

Robert Keach is a partner in Bernstein Shur, Portland, Maine, responsible for that firm's bankruptcy practice. On the appointment of the U.S. Bankruptcy Court for the Southern District of New York, he was the fee examiner in AMR, *In re AMR Corp.*, U.S. Bankruptcy Court, Southern District of New York, Case Nos. 11-15462 through 11-15481 (2011-2013), the Chapter 11 proceeding initiated by and for American Airlines, in which the professional fees requested totaled more than $400 million. He is serving now as the fee examiner in two Chapter 11 cases pending in the U.S. Bankruptcy Court for Delaware, *Exide Technologies*, Case No. 13-11482 (2013), and *In re Mineral Park, Inc.*, Case Nos. 14-11996 through 14-11999 (2014). Mr. Keach co-chairs the Commission to Study the Reform of Chapter 11, established by the American Bankruptcy Institute.

Nancy Rapoport is the Gordon Silver Professor of Law at the William S. Boyd School of Law at the University of Nevada, Las Vegas, and serves as the Senior Advisor to UNLV's president. Her focus has been bankruptcy ethics, law firm conduct, and ethics in governance, writing extensively about these issues. She has served as a fee examiner and testifying expert in a series of Chapter 11 proceedings, including *In re Station Casinos, Inc.*, U.S. Bankruptcy Court, District of Nevada, Case Nos. BK-09-52477 through BK-11-51219 (2011); *In re Pilgrims Pride Corp.*, U.S. Bankruptcy Court, Northern District of Texas, Case No. 08-45664 (2009-2010) (testified at hearing); and *In re Mirant Corp.*, U.S. Bankruptcy Court, Northern District of Texas, Case No. 03-46590 (2003-2006; 2011-2012) (testified). She also was a testifying expert in the bankruptcy court in this matter, though that testimony was limited to the fee enhancement request, no longer at issue.

Brady C. Williamson is a partner at Godfrey & Kahn, based in Milwaukee, and he also has taught at the University of Wisconsin Law School. The firm has served as counsel to the court-appointed Fee Committee in the Lehman Brothers Chapter 11 proceeding, in which the professional fees totaled more than $1.75 billion, and in *Energy Future Holdings, Inc.*, Case No. 14-10979 (CSS), pending in the U.S. Bankruptcy Court for Delaware. He was the fee examiner in the General Motors Chapter 11. *In re Motors Liquidation Co.*, No. 09-50026, WL 285359 at *1 (Bankr. S.D.N.Y. 2010), ("*General Motors*"). He has submitted amicus briefs to this Court in three other bankruptcy cases: *Central Virginia Community College v. Katz*, 546 U.S. 356

(2006); *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004); and, *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004).

Robert M. Fishman is a member of the Chicago law firm of Shaw Fishman Glantz & Towbin LLC and co-head of that firm's bankruptcy practice. On the appointment of Hon. Steven W. Rhodes, U.S. Bankruptcy Court for the Eastern District of Michigan, he serves as the fee examiner in the City of Detroit Chapter 9 case, *In re: City of Detroit, Michigan*, Case No. 13-53846, in which the professional fees requested total approximately $170 million. He is a former president of the American Bankruptcy Institute and a Fellow of the American College of Bankruptcy.

SUMMARY OF ARGUMENT

The U.S. Court of Appeals concluded, as a matter of law, that the Bankruptcy Code, in section 330(a), "does not authorize compensation for the costs counsel or [other] professionals bear to defend their fee applications." *In re ASARCO LLC*, 751 F.3d 291, 302 (5th Cir.), *cert. granted*, 135 S. Ct. 44 (2014). This statutory construction has established, at least in the Fifth Circuit, a rule that a professional may virtually *never* be compensated by the estate for defending a challenge by anyone to any request for compensation.

The law firms that have represented the Debtors in this proceeding, disappointed in the Fifth Circuit's ultimate resolution of their fee applications, have a different perspective. A bankruptcy court, they argue, has a very "broad grant of discretion" to award professional fees incurred in the defense of a challenged fee application. Pet. Brief at 4. Neither

party's perspective is wholly persuasive. Instead, a more appropriate standard could permit the law firms to be compensated—at least in part—for their successful fee defense.

This Court should vacate the U.S. Court of Appeals' decision and remand the dispute. The bankruptcy court should be able to approve compensation for a professional firm defending a fee application where the time and services involved in that defense were not only "reasonable" and "necessary" but where the professional substantially prevailed in the defense of its application for compensation.

ARGUMENT

ASARCO objected to Baker Botts' fee applications—applications submitted largely using the lodestar method under 11 U.S.C. § 330. ASARCO also objected to the firms' request for enhanced fees based on the extraordinary outcome of the proceeding. And, finally, ASARCO objected to the fees incurred by Baker Botts in defending the applications against the objections. This appeal solely involves the fee defense issue, asking if the Bankruptcy Code "grants bankruptcy judges discretion" to award compensation for defending a fee application. Question Presented, p. (i), Pet. Brief. Yet that is only part of the question.

At the outset, it is noteworthy that the resolution of the other fee issues, either by the bankruptcy court or consensually or both, is not atypical for a Chapter 11 proceeding. The bankruptcy court must approve all compensation requests, regardless of whether a party in interest objects. *See In re Busy Beaver Bldg. Ctrs., Inc.*, 19 F.3d 833, 841 (3d Cir.

1994). Litigated fee challenges that result in a judicial resolution rising through the U.S. Court of Appeals are nevertheless uncommon—even in very significant cases.

On remand from the district court here, the bankruptcy court concluded that the $5 million defense fee award was for the defense of the lodestar fee request and not for the defense of the fee enhancement. There has been no finding that any ASARCO objections were frivolous or made in bad faith. Indeed, the objections themselves are not at issue. It is the very fact of the bankruptcy court's defense fee award, not its precise contours or amount, that the *certiorari* petition placed at issue.

A. The Law Is Unsettled on Compensation for Defending Fee and Cost Objections.

The Bankruptcy Code permits a retained professional to seek compensation for *preparing* a fee application but only based on "the level and skill reasonably required to prepare th[at] application." 11 U.S.C. § 330(a)(6). Standing alone, however, that provision leaves open the question of whether time spent responding to requests for documentation or other information about a filed fee application, or responding to an objection, is compensable. Whether or not there is now a circuit split, this Court has decided to resolve the issue. *See* 3 Collier on Bankruptcy ¶ 330.03[16][a][ii] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2014).[4]

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[4] The petitioners maintained that there is a "stark[]" circuit split, Pet. at 18-19, citing (among others) *In re Smith*, 317 F.3d 918, 928 (9th Cir. 2002), and the Fifth Circuit's decision here.

Like the Fifth Circuit panel here, courts that have denied professionals any compensation for defending fees have reasoned that defending a fee application is a different activity within the meaning of the Bankruptcy Code than preparing the application. *E.g.*, *In re Riverside-Linden Inv. Co.*, 945 F.2d 320 (9th Cir. 1991) (fees denied; most objections sustained); *In re Wireless Telecomms., Inc.*, 449 B.R. 228, 237-38 (Bankr. M.D. Pa. 2011); *In re St. Rita's Assocs. Private Placement, L.P.*, 260 B.R. 650, 652 (Bankr. W.D.N.Y. 2001). The courts embracing this position, however, have generally acknowledged that, under the right facts, court-approved compensation may be appropriate nonetheless. *E.g.*, *Riverside-Linden*, 945 F.2d at 323 (fee litigation might be "necessary" and, therefore, compensable under other circumstances); *St. Rita's*, 260 B.R. at 652 (leaving open whether compensation could be awarded where the objection was itself not meritorious); *In re Teraforce Tech. Corp.*, 347 B.R. 838, 867 (Bankr. N.D. Tex. 2006) ("normally" counsel should not be compensated by the estate for fee defense, disallowing fees for defending largely meritorious objections filed in good faith).

The bankruptcy court in *In re Brous* analyzed the relatively few cases on the issue and denied the compensation requested by a Chapter 7 trustee for responding to a "good faith" fee objection. It noted both the force of the black-letter American Rule against fee awards to the prevailing party and the fact that the objecting party had "substantially prevailed." 370 B.R. 563, 572 (Bankr. S.D.N.Y. 2007); *accord*, *530 West 28th St.*, L.P., No. 08-13266, 2009 WL 4893287, at *11 (Bankr. S.D.N.Y. Dec. 11, 2009). In *Teraforce Tech. Corp.*, cited in *Brous* and

approvingly by the U.S. Court of Appeals here, the bankruptcy court noted the division of authority, cited *St. Rita's*, and emphasized the American Rule. The court concluded that the objections "were filed in good faith and ultimately resulted in a partial disallowance of the requested fees." 347 B.R. at 866. The Bankruptcy Code's undoubted silence on the fee defense issue led the court to conclude that "counsel should not normally be able to recover fees for defending a fee application...." *Id.* at 867.

Other courts have reached a facially different conclusion, construing the Bankruptcy Code's silence differently. "[R]equiring counsel who has *successfully* defended a fee claim to bear the costs of that defense is no different than cutting counsel's rate or denying compensability on an earlier fee application." *In re Worldwide Direct, Inc.*, 334 B.R. 108, 112 (D. Del. 2005) (emphasis added); *see also In re Ahead Commc'ns Sys., Inc.*, No. 02-30574, 2006 WL 2711752, at *4-5 (Bankr. D. Conn. Sept. 21, 2006). Again, however, those courts permitting compensation for fee defense have often noted that a *per se* rule is nonetheless inappropriate because it could encourage meritless fee requests. *E.g.*, *Worldwide Direct*, 334 B.R. at 112; *see also In re Parklex Assocs. Inc.*, 435 B.R. 195 (Bankr. S.D.N.Y. 2010) (no benefit to the estate but no *per se* rule against fee defense compensation); *In re Smith*, 317 F.3d at 928-29, *supra* n.4 (distinguishing *Riverside-Linden* on the basis of the merits of the objection, found "frivolous" in *Smith*, and granting fees based in part on concern about fee dilution).

The Bankruptcy Code's silence on the availability of estate compensation for defending a fee

application led Judge Cudahy (a senior 7th Circuit judge sitting in the 9th Circuit) in *In re Smith* to reach a conclusion different from that reached by the Fifth Circuit and several bankruptcy courts. Relying on section 330(a)(3)(F), the court said that denying compensation for defending contested fee awards would "reduce the effective compensation of bankruptcy attorneys to levels below the compensation available to attorneys generally." 317 F.3d at 928. The Court of Appeals there emphasized as well that the objections had been found "frivolous" and that counsel had successfully defended its fee award. *Id.* at 929, citing *In re Nucorp Energy, Inc.*, 764 F.2d 655 (9th Cir. 1985).

An alternative approach is less categorical, suggested by the focus of some cases on the merits of an objection and shifting that focus from the scope of the statutory "preparation" clause to the statutory "reasonableness" standard. That standard, heightened by analogy to fee-shifting statutes, could be applied to disallow compensation for defending a fee request that in some significant part failed to acknowledge or comply with established points of law and practice. *See infra* at Parts C., D.

Virtually all of the relevant decisions—regardless of the result, regardless of the jurisdiction—share a common trait: they shy away from a *per se* rule. Those decisions finding statutory authority to award fees for defending a challenge to compensation recognize that fee defense is not always compensable. Analogously, those decisions denying any authority to award fees for defending a challenge to compensation nonetheless recognize that fee defense may sometimes be compensable—if

only under the American Rule's exceptions and even though the Bankruptcy Code itself is not explicit on the issue. *See ASARCO*, 751 F.3d at 301. This amicus brief advances a middle ground that avoids a *per se* rule.

B. 11 U.S.C. § 330 Provides a Statutory Basis for Awarding, After a Heightened Review, Limited Compensation for the Defense of a Challenged Fee Application.

The Bankruptcy Code prohibits compensation for professional "services that were not reasonably likely to benefit the debtor's estate or; ... necessary to the administration of the case." 11 U.S.C. § 330(a)(3)(C), (a)(4)(A)[5]. ASARCO argues that the fees at issue here cannot conceivably benefit the estate because they will benefit only the law firms receiving them. The argument suggests a very narrow view of the term "benefit," limiting it to a quantifiable benefit attributable directly to the challenged services. However, estates and their administrators benefit from the professionals for the estates and for those who represent or advise committees. Their services, provided with zeal and competence, should not be subject to undue concern that the fees for them will be effectively reduced by unsuccessful challenges.

ASARCO's argument begs the question of the acknowledged and extraordinary benefit to the estate provided by the firms here through their representation in the Chapter 11 proceeding for

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[5] The Bankruptcy Code has other fee provisions not applicable here. *E.g.*, 11 U.S.C. § 362(k)(1) (costs and fees available for response to willful violation of the automatic stay).

more than four years. Reasonable professional services are a necessary predicate to a Chapter 11 proceeding, extraordinarily successful or not.

Putting ASARCO's benefit argument aside, however, the fee defense is, as a matter of fact and law, "necessary to the administration of the case." Indeed, it is inseparable from the case's administration because the statutes require U.S. Trustee review of professional fee applications and court approval on notice and a hearing. In this regard, the Fifth Circuit's analysis is at odds with itself.

"[T]he specification of an award for 'preparation of a fee application' is clearly different from authorizing fees for the defense of the application in a court hearing." 751 F.3d at 300. The two are "clearly different," to be sure, but one inexorably follows the other. The fact that the Bankruptcy Code does not provide "explicit statutory authority" for awarding fees for the defense of a challenged application does not preclude such an award. For, just as certainly, the statute does not explicitly prohibit the award of those fees. Rather, it prohibits duplicative fees, unnecessary fees, or fees not "reasonably likely to benefit" the estate. 11 U.S.C. § 330(a)(4)(A).

In the absence of "explicit" language, either affirmatively or negatively resolving the question, the issue devolves to the circumstances under which defense fees can be awarded. ASARCO concedes that, under the American Rule, a bankruptcy court can award defense fees in the face of a frivolous or vexatious challenge. The prohibition, then, is not absolute but necessarily case-by-case. If the

statutory silence actually had the preemptive effect advanced by ASARCO, even the American Rule exceptions should be unavailable. But the silence does not occur in a vacuum. The Bankruptcy Code itself provides context, in section 330, that helps eliminate the silence.

C. Any Award of Compensation for Defending a Challenged Fee Application Requires a Heightened Standard of Review.

ASARCO agrees that, under "a settled exception to the American Rule," professional fees are compensable for a response to "frivolous or bad faith objections." Br. for the Resp't in Opp'n, at 2. Baker Botts' position lies at the other end of the spectrum—a bankruptcy court has virtually unfettered discretion to award defense fees. This Court should accept neither position. The first requires too much; the second too little.

The "American Rule" generally places the financial burdens of costs and counsel on each party, regardless of outcome. Its simplicity, history, and rare (though recognized) exceptions commend it. Yet that rule should not be applied by rote in Chapter 11 proceedings because of the Bankruptcy Code's specific requirements for professionals and the specific mandate for judicial review for all professional fees. Moreover, a Chapter 11 reorganization proceeding is not inherently or pervasively adversarial, making a civil litigation analogue imperfect.

In fact, the American Rule is inapposite to the issue of estate-paid fees in bankruptcy cases because that rule reflects the presumptive division of legal costs in an adversarial situation—each side bears its

own costs, subject to exceptions. In bankruptcy cases, though, the courts exercise two very different functions. One is adjudicative—determining specific rights through motions, objections, and adversary proceedings.[6] The other is administrative—ensuring that the progression of the case, from its filing to its ultimate disposition, follows the Bankruptcy Code. In particular, authorizing and compensating estate-paid professionals is codified in Chapter 3 of the Bankruptcy Code, "Case Administration," rather than in the sections of the Code dealing with specific parties' rights. Unlike a traditional fee-shifting or class action case, where the award of fees is part of the litigation itself, all estate-paid fees in bankruptcy cases require court review—whether or not those fees are associated with particular litigation and whether or not any party in interest has objected to those fees. Associating estate-paid fees with a "winning side," therefore, does not capture the nature of case administration in bankruptcy.

Moreover, in non-bankruptcy matters, the extent to which fees are scrutinized (if at all) is often very different. A lawyer defending or prosecuting a breach of contract case need not submit her fees for court approval nor need that lawyer record the time she has spent each day and the tasks she has performed—indeed, to the tenth of an hour. Not so in bankruptcy cases. "The equities" in specific fee

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[6] *See, e.g.*, 11 U.S.C. §§ 547 (preferences), 548 (fraudulent transfers), 544 (trustee as successor to certain creditors and purchasers); Bankruptcy Rules Part VII (adversary proceedings); Fed. R. Bankr. P. 9014 (contested matters).

shifting statutes, the Court of Appeals concluded, "are quite different" from those "in bankruptcy." 751 F.3d at 300. Perhaps. But so are the demands placed by Congress on professionals applying for compensation and, in turn, on the U.S. Trustee system and the bankruptcy courts.

When Congress enacted the Bankruptcy Code in 1978,[7] it rejected the old "economy of administration" standard, which had systematically undercompensated bankruptcy professionals. Instead, Congress specifically provided, pursuant to 11 U.S.C. § 330(a)(3)(F), that the compensation of bankruptcy professionals should be commensurate with the reasonable compensation available to counsel in non-bankruptcy cases, including consideration of the actual value of their services. This presumption of fair and comparable compensation has continued through amendments to section 330, but the presumption itself has left these parties divided.[8]

This is Baker Botts' argument: If bankruptcy professionals are to be compensated fairly, based on the reasonableness of their work and charges, then they should be entitled to all of their reasonable fees defending that compensation. Ill-founded attacks on

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[7] Bankruptcy Reform Act of 1978, Pub. L. No. 95–598, 92 Stat. 2549 (1978).

[8] *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 433, 98 Stat. 333, 370 (1984) (codified at 11 U.S.C. § 330); Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994) (same); Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005) (same).

reasonable fees chip away at those fees by causing the professionals to incur unnecessary defense costs. Should those unnecessary costs go uncompensated, then the effective recoverable fees are diminished—that is, diluted—sometimes significantly so.

This is ASARCO's argument: Agreeing that the 1978 Code sought to make professional fees in bankruptcy commensurate with compensation outside bankruptcy, the American Rule should apply in bankruptcy. In *any* case, after all, every effort to obtain professional compensation from the "other" side entails the expenditure of time and money and, necessarily, dilutes the ultimate award.

If this Court were to take ASARCO's perspective to its logical limit, however, there would be no check, other than Bankruptcy Rule 9011, on any parties in interest who wished to file unfair or tactical objections to fee applications. Every objection requires the professional whose fees are being questioned to respond in some manner—to suggest a proposed compromise or to file a formal response to the objection—and every such response costs time and, therefore, money. Aggressive parties in interest could create disincentives for bankruptcy professionals—in a sense, suggesting that bankruptcy professionals either fulfill their fiduciary duties without charge or pull their punches to avoid triggering tactical fee objections.

A rule permitting "fees on fees" when the professional substantially prevails in a fee application dispute would forestall gamesmanship. For legitimate and well-grounded objections, each party would bear its own costs of litigating the objection. For objections in which the bankruptcy

professional wins some of the arguments but loses a number of the others, each party would bear its own fees. Only in the situation in which most of the objections were not well-taken would the bankruptcy professional be entitled to fees on fees.

The law firms here argue, with a basis in lower court decisions, *see supra* at Part A., that a "successful" fee defense should always be compensable and, by implication, that even an unsuccessful but grounded defense might be compensable at the court's discretion. Part of the difficulty with that argument lies in the definition of "success."

Fee challenges involve a variety of issues and categories, either in individual, in serial, or in final fee applications. Indeed, the challenges here involved a range of professional services, billing practices and issues. According to Baker Botts, ASARCO "launched an all-out assault...attack[ing] everything—time-entry descriptions, task codes in invoices, staffing choices, and the necessity and quality of various legal services." Pet. Brief at 11. That range of potential challenges is not unfamiliar in the bankruptcy courts, and it should inform the Court's decision here. Fee challenges are rarely wholesale—all or nothing—as they can be portrayed at this stage of this litigation and in most civil litigation. The range of fee objections and the process for resolving them in Chapter 11 are too nuanced and incremental for that.

D. The Practical Approach Developed in the *American Airlines* and *General Motors* Proceedings Provides Context for the Court's Decision Here.

To state the obvious, Chapter 11 proceedings that involve large companies correlate—though not invariably—with significant professional fees.[9] The amount of the fees requested correlates in turn with the complexity of the case and the number of professionals involved in it—that is, those professionals retained by the debtor, by the creditors' committees, and occasionally by *ad hoc* committees seeking compensation under section 503(b).

ASARCO notes that 191 timekeepers, including 150 attorneys, worked on the defense of the law firms' compensation request. For comparative purposes, it is a matter of public record that the professional applications in the *Lehman Brothers* proceeding reflected the work of 5,300 timekeepers altogether and, in *AMR*, the work of about 2,200 timekeepers, though in each instance those totals encompassed the entire proceeding, not just professional compensation issues. The question presented here does not directly involve the size or length of the proceeding, or the amount of compensation requested from the estates—$120 million altogether—or the number and billing

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[9] *E.g.*, Stephen J. Lubben, *Corporate Reorganization & Professional Fees*, 82 Am. Bankr. L.J. 77 (2008); Nancy B. Rapoport, *Rethinking Professional Fees in Chapter 11 Cases*, 5 J. Bus. & Tech. L. 263 (2010).

rates of timekeepers for the Baker Botts petitioners.[10]

Ideally, and most often in practice, professional compensation issues—including disagreements over "fees for fees"—are resolved consensually. In the *Lehman* proceedings, the bankruptcy court, with one exception, had no need to resolve contested fee disagreements during the four years of the proceeding. *See In re Lehman Bros. Holdings Inc.*, No. 13-CIV-2211, 2014 WL 3408574 (S.D.N.Y. June 26, 2014). So, too, in the *AMR* case. In another noteworthy Chapter 11 proceeding, however, the bankruptcy court did address contested compensation for the defense of professional fees.

In *General Motors*, the bankruptcy court established a practical standard that integrated the American Rule with the unique requirements of the Bankruptcy Code:

> While the reasonable costs of [preparing] required fee applications are compensable, that doesn't mean that the costs of defending objections to those fee applications are necessarily compensable as well—since as Chief Judge Bernstein of this Court observed in *CCT Communications*, [No. 07-10210, 2010 WL 3386947, at *8-9 (Bankr. S.D.N.Y. Aug. 24, 2010),] there's no parallel statutory requirement to defend against an objection to a fee application, or to receive compensation

[10] The Debtors' principal law firm in *AMR* filed applications totaling about $80 million, and the principal law firm in *Lehman* requested $442 million in compensation.

> for the legal fees incurred in that defense. Rather, as a general matter, fee litigants, like other litigants, must generally bear their own legal expenses under the "American Rule."
>
> But I also agree with Judge Bernstein that professionals shouldn't be penalized by the cost of defending meritless objections. Failing to allow professionals the costs of defending meritless objections would dilute fee awards, and encourage parties to file frivolous objections.
>
> Thus, where the outcome is a split decision, or the fee applicant otherwise fails to substantially prevail, I believe that the applicant should indeed bear its own legal expenses for addressing the objection to its fees, under the American Rule. But as in *CCT*, I believe that I should authorize payment of the costs of defending against the objection if the fee applicant substantially prevails.

In re Motors Liquidation Co., No. 09-50026, 2010 WL 285359, at *1 (Bankr. S.D.N.Y. Nov. 23, 2010) [Docket No. 7896].

This standard modifies the American Rule to fit the unique requirements of the Bankruptcy Code and, indirectly, the law involving fee-shifting statutes. Referring to a "split decision," the standard articulated by the bankruptcy court in *General Motors* also recognized that the burden of proof always rests with the applicant. *See In re Engel*, 124 F.3d 567, 573 (3d Cir. 1997).

The fee examination process in *AMR* and *Exide* followed a similar approach. The fee examiner, an amicus here, collected the relevant cases and developed a protocol that recognized the generally consensual nature of the review process, through negotiation, when that process involves a fee examiner or a fee review committee.

> The Fee Examiner will generally recommend that time be treated as compensable when spent (a) preparing an initial response to the Preliminary Report...[that is, the preliminarily analysis of the fee application by the fee examiner]; (b) in an initial meeting or teleconference with the Fee Examiner as to a Preliminary Report; and/or (c) considering a single revised resolution proposal or response by the Fee Examiner....Continued negotiations after that time will likely be treated as solely for the benefit of the Retained Professional and as not compensable. The Fee Examiner, however, reserves the right to challenge ***any*** time spent...if the Fee Application is materially deficient and such deficiencies precipitated any inquiries or objections...or where the Fee Examiner determines that all or part of any such response is not in good faith and/or not supported by a reasonable interpretation of prevailing law or guidelines.

In re Exide Technologies, *supra* at 3 (emphasis in original), Fee Examiner's Consolidated Final Report Pertaining to the Interim Fee Applications of Certain Retained Professionals for the Period from June 10, 2013 through August 31, 2013 and the

Period from September 1, 2013 through November 30, 2013 at 53 [Docket No. 1921]; *accord*, *In re AMR Corp., supra* at 3 [Docket No. 8270].

The *AMR* and *Exide* fee examiner recognized every professional's right to seek even contested fees and expenses—not only as a matter of due process but because the bankruptcy court has the final and statutory responsibility to review and approve all compensation requests. That recognition came with the caveat reflected in that case and in this brief: the defense of "any actual objections preserved in a Final Report of the Fee Examiner will be treated as not compensable unless the Retained Professional substantially prevails in such defense, as determined by the Court." *Id.*

In both *AMR* and *General Motors*, the court applied the "substantially prevailed" standard in the context of interim compensation applications, usually filed every four months and involving, at times, a series of discrete disagreements over fees for time spent on discrete projects. The time spent (and the associated fees) on a summary judgment motion, for example, might be challenged on the ground that the motion was improvident in light of obviously-contested material facts. In response, the court might find that some of the time spent was warranted but not time spent beyond the initial research and evaluation. Some of the professional fees, in that event, might be compensable as both necessary and reasonable, but the fees charged for seeking compensation would not because the professional would not have "substantially prevailed" on the fee defense issue.

The standard advanced here does not depend on a quantitative determination—though that is a factor. If 100 hours were expended on the project, a determination that 51 of those hours were necessary and reasonable would not yield an award of all of the fees for the entire project, nor would it yield an award of even 51 percent of the time spent defending the fee application. Similarly, in an application for interim compensation, if the fees for five discrete projects were subject to challenge and the professional prevailed on three of them, that too would not necessarily satisfy the "substantially prevailed" standard for an award of defense fees.

A departure from the American Rule for "substantially prevailing" or "prevailing" parties has obvious precedent. Fee shifting is most prominent in actions to enforce federal civil rights laws, including the Civil Rights Act of 1964 and the Individuals with Disabilities Education Act. Congress has extended fee shifting provisions through "[a]t least 34 statutes in 10 different titles of the U. S. Code...." *West Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 88-89 (1991) (superseded by statute on other grounds). "These statutes encompass diverse categories of legislation, including tax, administrative procedure, environmental protection, consumer protection, admiralty and navigation, utilities regulation, and, significantly, civil rights...." *Id.*

Although the rationale underlying fee shifting—providing an impetus for private litigants to enforce Congressional policies—is distinct from that proposed here, both the concept of allowing courts to shift fees and the definition of "success" are familiar.

For example, a prevailing party for purposes of fee-shifting under section 1988 is one that has "succeed[ed] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (*citing Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)). "Accordingly, the outer boundary of the term 'prevailing or substantially prevailing party' is that a party must receive at least some relief on the merits of its claim before being considered a prevailing or substantially prevailing party." *Painewebber Income Properties Three Ltd. P'ship v. Mobile Oil Corp.*, 916 F. Supp. 1239, 1242 (M.D. Fla. 1996) (*citing Hewitt v. Helms*, 482 U.S. 755, 759-60 (1987)).

In *Texas State Teachers Ass'n v. Garland Independent School Dist.*, this Court explained that "Congress clearly contemplated that interim fee awards would be available 'where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all issues.'" 489 U.S. 782, 790 (*citing* S. Rep., No. 94-1011, at 5 (1976)). The "door" through which a "plaintiff has crossed the threshold to a fee award of some kind" is that "a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." *Id.* at 791-92 (*citing Hewitt*, 482 U.S. at 760).

However, while success on a significant issue "brings the plaintiff [] across the statutory threshold ... it remains for the district court to determine what fee is 'reasonable.'" *Hensley*, 461 U.S. at 433. In addition to an analysis of whether the fees requested were "reasonably expended" and at a "reasonable

rate," the Court emphasized that the "results obtained" are critical to the analysis. *Id.* at 434.

> This factor is particularly crucial where a plaintiff is deemed "prevailing" even though he succeeded on only some of his claims for relief.... In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit....
>
> If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount....

Id. at 435-36.

Petitioners cite *Commissioner, I.N.S. v. Jean*, 496 U.S. 154 (1990), in support of their position that the bankruptcy court has broad discretion to award defense fees. The holding in *Jean* is not inconsistent with the standard proposed here. There, this Court held that once a litigant had met the threshold for eligibility as a prevailing party under the Equal Access to Justice Act, after a finding that the government's position was not "substantially justified," the district court then properly applied a reasonableness determination without yet another "substantially justified" test for the fee issue. *Id.* at 160-163. The standard suggested here is that the professional defending a fee application must "substantially prevail" in the defense of its application to meet the eligibility threshold for compensation for that defense. Once met, the bankruptcy court would then determine a fee award,

applying the reasonable and necessary standards in the Bankruptcy Code.

Of course, unlike the Equal Access to Justice Act or the Civil Rights Act or other statutes, the Bankruptcy Code contains no express fee-shifting provision.[11] In the absence of any such provision, the standard for achieving the "threshold"—to be even eligible to recover defense fees—is necessarily more stringent, consistent with both the bankruptcy court's statutory obligations *and* its discretion. Rather than merely prevailing on "any significant issue in litigation," the standard advanced here would require that a professional "substantially prevail" on the compensation issues in order to be eligible to be paid by the estate for that fee defense. Only with success on a significant range of issues would a court then turn to the second step of the analysis: whether the fees requested are reasonable.

Here, without examining the professionals' time records, it is not possible to apply a heightened

---

[11] Federal antitrust law, 15 U.S.C. § 4304, provides that courts shall award fees to a "substantially prevailing claimant" in a claim based on the conduct of a joint venture. So, too, the Freedom of Information Act provides that a district court "may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any [FOIA] case ... in which the complainant has substantially prevailed." 5 U.S.C. § 552(a)(4)(E)(i). "For purposes of [FOIA], a complainant has substantially prevailed if the complainant has obtained relief through ... a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial." 5 U.S.C. § 552(a)(4)(E)(ii); *see Zarcon, Inc. v. N.L.R.B.*, 578 F.3d 892, 894 (8th Cir. 2009); *Judicial Watch, Inc. v. F.B.I.*, 522 F.3d 364, 370 (D.C. Cir. 2008).

standard. Yet the bankruptcy court, on remand, did reduce the amount awarded for defending the fee objection to the core fees (not the enhancement) to $5 million. On a subsequent remand, the bankruptcy court will have the opportunity to reconsider its evaluation, looking at discrete objections to discrete blocks of time, under the new standard—if it has not already done so.

There is wide room for bankruptcy court discretion, as there is for every evaluation of professional fees, but it cannot be the unfettered discretion advocated by the law firms here. Consistent with the standards in statutory fee-shifting cases, integrating the demands of the Bankruptcy Code and the American Rule, the bankruptcy courts should be permitted to award fees for the defense of fee applications for those professionals that substantially prevail on that defense.

A flexible rule also encourages professionals to provide information to the bankruptcy court, to the U.S. Trustee, and to interested parties and to work toward a consensual resolution of fee issues, secure in the knowledge that such compensation will not be automatically diluted (by automatically denying compensation). Denying *all* defense compensation necessarily does result in a dilution of an otherwise allowed award of reasonable and necessary fees. And the virtually automatic denial of defense fees contravenes a precept of the Bankruptcy Code: that bankruptcy professionals be compensated at the same level and on the same terms as non-bankruptcy professionals. Sometimes, defense

fees, in whole or in part, are warranted; sometimes not.

This Court's decision here should avoid any *per se* rule—either generally permitting or generally prohibiting—the compensability of defense fees. Implicitly or explicitly, moreover, the Court should note the practical dimension of the review, resolution, and approval process for professional fees in Chapter 11 proceedings. The facts of this case are, in so many ways, exceptional. With or without a fee committee or a fee examiner, the consensual resolution of fee disagreements is the norm. Any *per se* rule would discourage that resolution. A system without restraint on the award of defense fees could encourage meritless fee requests and a license to defend them beyond reason or necessity. A system that made defense fees virtually unobtainable could encourage meritless objections.

Baker Botts concludes its brief by stating that the Court "need not further define the circumstances when defense fees may or may not be awarded." Pet. Brief at 57. As much as the amici may agree with other dimensions of the petitioners' argument, they disagree with this suggestion. Like Baker Botts, the amici contend that the bankruptcy courts do have the authority to award professional compensation for defending fee applications, but the amici contend as well that the bankruptcy courts' discretion requires some boundary. The "substantially prevailed" standard provides that boundary.

The "broad grant" of discretion to the bankruptcy court sought here—to award compensation for defending fee applications—is not inherently limited to the successful defense of all or even a significant

part of a fee application. To be sure, Baker Botts argues that the "[d]iscretion to compensate *successful* fee-application defenses properly aligns the incentives of both fee applicants and potential objectors." Pet. Brief at 51 (emphasis added). In the context of fee applications generally and the fee review process in bankruptcy in particular, however, "success" and "successful" are relative and often serial or piecemeal concepts.

Here, Baker Botts may well have prevailed on every itemized challenge brought by ASARCO, and that would make a determination on remand under a new standard both brief and relatively painless. It then would be readily apparent that Baker Botts "substantially prevailed." However, for those myriad bankruptcy proceedings yet to be filed and for the fee applications yet to be reviewed, a decision by this Court only affirming—or, for that matter, only reversing—the Court of Appeals' decision without a remand and an articulated standard will provide insufficient guidance.

CONCLUSION

For the reasons stated above, the Court should vacate the opinion of the U.S. Court of Appeals for the Fifth Circuit, recognizing the compensability of defense fees under limited circumstances and remanding the fee dispute for reconsideration and resolution consistent with this Court's opinion.

Respectfully submitted,

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IN THE
Supreme Court of the United States

BAKER BOTTS L.L.P. AND JORDAN, HYDEN, WOMBLE, CULBRETH & HOLZER P.C., PETITIONERS

v.

ASARCO LLC

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AMICUS CURIAE BRIEF OF THE STATE BAR OF TEXAS BANKRUPTCY LAW SECTION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

Table of Authorities II

Interest of *Amicus Curiae* 1

Summary of Argument 3

Argument 5

A. Section 330(a)(4)(A) Does Not Prohibit Allowance Of Compensation For Services Found Not To Benefit The Estate Where Fees Incurred Are For Services That Are Necessary To The Administration Of The Case 5

B. The Fifth Circuit's Rule Burdens Estate Officers And Incentivizes Fee Structuring Arrangements That Impose Costs On All Bankruptcy Estates 16

C. The Fifth Circuit's Ruling Will Increase Meritless Fee Litigation 18

D. The Issue Is Of National Importance To All Officers 20

Conclusion 21

TABLE OF AUTHORITIES

Page(s)

Cases

Barron & Newburger, P.C. v. *Tex. Skyline, Ltd. (In re Woerner)*, 758 F.3d 693 (5th Cir. 2014) 8

Grant v. *George Schumann Tire & Batt. Co.*, 908 F.2d 874 (11th Cir. 1990) 7

In re NuCorp Energy, Inc., 764 F.2d 655 (9th Cir. 1985) 15, 16

In re Worldwide Direct, 334 B.R. 108 (Bankr. D. Del. 2005) 13

Matter of Pro-Snax Distributors, Inc., 157 F.3d 414 (5th Cir. 1998) 7, 8

Schane v. *Int'l Brotherhood of Teamsters Union Local No. 710 Pension Fund Pension Plan*, 760 F.3d 585 (7th Cir. 2014) 10

Smith v. *Edwards & Hale, Ltd. (In re Smith)*, 317 F.3d 918 (9th Cir. 2002) 8, 15, 16

U.S. v. *One 1973 Rolls Royce, V.I.N. SRH-16266*, 43 F.3d 794 (3d Cir. 1994) 10

Statutes

11 U.S.C. § 327 20

11 U.S.C. § 327(a) 20

11 U.S.C. § 330 ..... *passim*

11 U.S.C. § 330(a) ..... *passim*

11 U.S.C. § 330(a)(1) 3, 5, 14

11 U.S.C. § 330(a)(2) 3, 5, 12
11 U.S.C. § 330(a)(3) 5, 6
11 U.S.C. § 330(a)(3)(C) 11
11 U.S.C. § 330(a)(3)(F) 7
11 U.S.C. § 330(a)(4) 6, 7, 14
11 U.S.C. § 330(a)(4)(A) ..... *passim*
11 U.S.C. § 330(a)(4)(A)(i) 10
11 U.S.C. § 330(a)(4)(A)(ii) ..... *passim*
11 U.S.C. § 330(a)(4)(A)(ii)(I) 8, 10
11 U.S.C. § 330(a)(4)(A)(ii)(II) ..... *passim*
11 U.S.C. § 330(a)(6) ..... *passim*
11 U.S.C. § 332 20
11 U.S.C. § 333 20
11 U.S.C. § 503(b)(2) 13
11 U.S.C. § 1102 20
11 U.S.C. § 1103 20
11 U.S.C. § 1103(a) 20

Other Authorities

78 F.R. 36248-02, 2013 WL 2902995 (F.R.), at *36255 (June 17, 2013) 18

Collier on Bankruptcy (Alan Resnick & Henry J. Sommer eds., 16th ed.) 15

Federal Rule of Bankruptcy Procedure 2016 12

Federal Rule of Bankruptcy Procedure 9011 19

H.R. Rep. No. 95-595, at 11 U.S.C. § 330 (1977) ... 17

Lubben, Stephen J., *Chapter 11 Professional Fee Study* 35 (American Bankruptcy Institute, 2007) 20

Presentation of the Landmark ABI Fee Study: Conclusions and Ramifications 8, ¶¶ 15-16 (American Bankruptcy Institute, Winter Leadership Conference 2007) *available at* http://goo.gl/zZltxr 20

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State Bar of Texas Board of Directors Policy Manual 5 (Revised Jan. 2014) 1

TBLS Mission Statement, *available at* http://www.statebaroftexasbankruptcy.com 2

U.S. Bankruptcy Courts – Business and Nonbusiness Cases Commenced by Chapter of the Bankruptcy Code During the 12-Month Period Ending June 30, 2014, *available at* http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2014/0914_f.pdf 19

Warner, G. Ray & Shapiro, Keith J., *American Bankruptcy Institute, National Report on Professional Compensation in Bankruptcy Cases* (LRP Publications, 1991). 17

INTEREST OF *AMICUS CURIAE*[1]

The State Bar of Texas was created to "provide specialized professional advice to those with the ultimate responsibility of governing the legal profession in serving the public" and has the stated mission to "support the administration of the legal system, assure all citizens equal access to justice, foster high standards of ethical conduct for lawyers, enable its members to better serve their clients and the public, educate the public about the rule of law and promote diversity in the administration of justice and the practice of law."[2] The State Bar of Texas authorizes and maintains various sections "for the purpose of promoting the objectives of the State Bar within the particular field designated by the bylaws of each section."[3]

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to this filing.

Neither this brief nor the decision to file it should be interpreted to reflect the view of any judicial member of TBLS. No judicial member of TBLS participated in the decision to file this brief, nor did any such member review it before filing (including Richard S. Schmidt, United States Bankruptcy Judge for the Southern District of Texas, who presided over the ASARCO LLC bankruptcy case). Counsel for petitioner Baker Botts L.L.P., Omar Alaniz, is Vice-President-Professional Education of TBLS, but he did not participate in the decision to file this brief or review it before filing.

[2] State Bar of Texas Board of Directors Policy Manual 5 (rev. Jan. 2014), *available at* http://goo.gl/tGH3Sa.

[3] *Id.* at § 5.01.01.

Amicus curiae, the State Bar of Texas Bankruptcy Law Section (the "TBLS") is a section within the State Bar of Texas that was organized approximately ten years ago and currently has approximately 1,500 members who are attorneys licensed to practice law in the State of Texas.[4] TBLS has the stated purposes of (a) providing a platform for practitioners of bankruptcy law (wherever located) who are licensed to practice law in the State of Texas to exchange information and ideas on a regular basis and (b) providing opportunities for lawyers practicing bankruptcy law to attain and build upon the skills, experience, and relationships that will enhance the practice of bankruptcy law in the State of Texas.[5]

This case presents the question whether 11 U.S.C. § 330(a),[6] which addresses the compensation of officers, *prohibits* a bankruptcy judge from compensating an officer for the defense of its fee application. While this case involves attorney compensation, § 330(a) governs the compensation of *all* officers; thus, the answer to the question presented will directly affect the compensation of all officers—a much broader group than attorneys—and also will have a substantial impact on the structuring of fee arrangements between bankruptcy attorneys and their trustee, debtor in possession, and official committee-clients.

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[4] Membership in TBLS is also open to non-attorney members.

[5] See TBLS Mission Statement, *available at* http://www.statebaroftexasbankruptcy.com.

[6] Unless otherwise indicated, statutory citations refer to the United States Bankruptcy Code, Title 11 of the United States Code.

The Fifth Circuit's decision below, which disallows compensation for fee application defense services, misinterprets the compensation standards under § 330 and has an adverse impact on the compensation of officers in the administration of bankruptcy cases. The decision has direct adverse consequences for attorneys who are licensed to practice law in the State of Texas (many of whom practice in bankruptcy courts nationwide) and are engaged to represent, among others, a trustee, debtor in possession, or official committee in a bankruptcy case filed in the Fifth Circuit. Accordingly, TBLS files this brief as *amicus curiae* and urges this Court to reverse the Fifth Circuit's ruling.

SUMMARY OF ARGUMENT

Bankruptcy Code § 330(a)(1) broadly authorizes bankruptcy courts to award reasonable compensation for actual, necessary services rendered by officers, including professional persons, absent an explicit statutory prohibition. A proper reading of the provision that creates limited exceptions to the court's discretionary officer compensation authority, § 330(a)(4)(A), demonstrates that it does not prohibit compensating officers for defense-of-fee-application litigation, which is necessary to the administration of a bankruptcy case. Notably, even though the Bankruptcy Code does not prohibit allowance of such compensation, it does not guarantee its payment, which is subject to the discretion of the bankruptcy court, and § 330(a)(2) expressly provides that a bankruptcy court can award compensation less than the amount requested. Thus, there is express statutory protection of the estate and interested

parties with respect to any award of officer compensation.

The Fifth Circuit's conclusion that § 330 prohibits allowance of compensation for the defense of fee applications should be reversed because the court did not properly consider whether such compensation may be allowed because it is necessary to administration of the case under § 330(a)(4)(A)(ii)(II). Rather, the Fifth Circuit analyzed only whether the services rendered benefitted the debtor's estate in its analysis of § 330(a)(4)(A)(ii). The Fifth Circuit erred because § 330(a)(4)(A)(ii) provides that fees are non-compensable only if *two* criteria are met: (I) the services were not likely to benefit the estate *and* (II) the services were not necessary to the administration of the case. Defending objections to fee applications and related litigation are necessary to the administration of a bankruptcy case under chapter 3 of the Bankruptcy Code (entitled "Case Administration") given that compensation disputes require resolution under § 330(a) as an integral part of bankruptcy case administration. Thus, such compensation for fee application defense may be awarded by a bankruptcy court in its discretion under § 330(a).

The Fifth Circuit's interpretation of § 330(a) unfairly penalizes officers and incentivizes them to increase their fees to account for the potential cost of resolving compensation disputes and then pass on those costs to all bankrupt estates and their creditors, a patently inequitable result.

The Fifth Circuit's decision should be reversed.

ARGUMENT

This Court should reverse the Fifth Circuit ruling below due to its erroneous application of § 330(a)(4)(A), and to eliminate its potentially far-reaching negative repercussions for bankruptcy law practitioners and other officers.

A. Section 330(a)(4)(A) Does Not Prohibit Allowance Of Compensation For Services Found Not To Benefit The Estate Where Fees Incurred Are For Services That Are Necessary To The Administration Of The Case

1. Situated in chapter 3 of Title 11 of the United States Code (entitled "Case Administration"), subchapter II (entitled "Officers"), § 330(a) governs the compensation of officers, and it grants bankruptcy courts discretion to award compensation subject to certain enumerated exceptions. Specifically, § 330(a) provides that a court "*may* award" to officers "*reasonable compensation for actual necessary services rendered*" and may "award compensation that is less than the amount of compensation that is requested." 11 U.S.C. § 330(a)(1), (2) (emphasis added). It then sets forth a list of factors for the court to consider when evaluating the amount of compensation requested, including "whether the services were necessary to the administration of, *or* beneficial at the time at which the service was rendered toward the completion of, a case under this title." *Id.* at § 330(a)(3) (emphasis

added).[7] Section 330(a) further places certain limitations on the amount of compensation for preparation of a fee application, stating that "[a]ny compensation awarded for the *preparation of* a fee application shall be based on the level and skill reasonably required to prepare the application." *Id.* § 330(a)(6) (emphasis added).

Section 330(a)(4) sets forth a limited number of exceptions to the bankruptcy court's discretion to award "reasonable compensation." It provides, in pertinent part:

> * * * [T]he court shall not allow compensation for
>
> (i) unnecessary duplication of services; or
>
> (ii) services that were *not* –
>
> (I) reasonably likely to benefit the debtor's estate; *or*
>
> (II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A) (emphasis added). It follows that, where fees and expenses incurred are necessary to the administration of the case, even if they are not found to have benefitted the estate, § 330(a)(4)(A)(ii) does not prohibit their allowance.

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[7] Section 330(a)(3) and existing case law (the so-called "lodestar" test) contain factors to be considered with respect to the amount of fees and expenses that may be allowed, see Pet. App. 5a-7a, and those factors may well lead a bankruptcy court to reduce or disallow payment of requested fees and expenses, depending on the circumstances of the case.

2. The Fifth Circuit's opinion below considered whether petitioners' requested compensation was prohibited from being allowed under § 330(a)(4)(A) and *referenced* both the benefit-to-the-estate test and the necessary-to-case-administration test set forth in § 330(a)(4)(A)(ii), stating that "professional services are compensable only if they are likely to benefit a debtor's estate or are necessary to case administration."[8] See Pet. App. 14a, 15a. However, in making its ruling, the Fifth Circuit erred by only *applying* the "benefit to the estate" prong of the § 330(a)(4)(A)(ii) test. Pet. App. 14a, 15a. The court reasoned that petitioners' fees are not compensable because the fees "brought absolutely no *benefit to the estate, the creditors, or the debtor.*" *Id.* at 15a (quoting *Grant* v. *George Schumann Tire & Batt. Co.*, 908 F.2d 874, 882-83 (11th Cir. 1990)) (emphasis added).[9]

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[8] The court makes what seems to be two additional references to § 330(a)(4) that actually appear to be typographical errors. On one occasion, the court cites to § 330(a)(4), but by the context of the substantive discussion in that paragraph, it is clear the court intended to reference § 330(a)(6). See Pet. App. 16a. On another, the court again erroneously cites to § 330(a)(4) when addressing arguments relating to the reasonableness of the *amount* of a claim for compensation under the "comparability factor," an apparent reference to § 330(a)(3)(F). See Pet. App. 18a.

[9] The Fifth Circuit, citing to its prior decision in *Matter of Pro-Snax Distributors, Inc.*, 157 F.3d 414, 418 n.7 (5th Cir. 1998), reached its conclusion on the understanding that, normally, creditors bear the cost of defense (even though, in this case, creditors bore none of that cost as they were paid in full). Pet. App. 15a. The *Pro-Snax* footnote referencing § 330(a)(4)(A), which is cited in the opinion below, was included in the *Pro-*

The court then appeared to reject the argument—embraced by the Ninth Circuit in the case on the other side of the circuit split that prompted this Court's review—that "because resolving professional fees is required to close a case, their litigation is a reasonable and necessary aspect of case administration." Pet. App. 16a (citing *Smith* v. *Edwards & Hale, Ltd. (In re Smith)*, 317 F.3d 918, 929 (9th Cir. 2002)). But rather than engaging that argument on the merits, the Fifth Circuit dismissed out of hand the idea that there might be a "broader scope" for the "reasonableness and necessity of services *to the debtor's estate*" and that the "benefit to the estate" view "more closely reflect[ed]" the "statute's plain meaning." *Id.* at 16a. By focusing exclusively on the "reasonableness and necessity *to the debtor's estate*," *ibid.*; compare § 330(a)(4)(A)(ii)(I) (prohibiting payment of fees for "services that were not * * * reasonably likely to benefit *the debtor's estate*") (emphasis added), the Fifth Circuit read out

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Snax opinion in support of the statement that "an attorney's work *must* benefit the estate before any compensation is payable * * * " *Pro-Snax*, 157 F.3d at 418. But that statement is wrong, as discussed *infra*, because, in order to be saved from disallowance under § 330(a)(4)(A), fees *must* be for services that benefit the estate *only* if those fees are *not* for services that are "necessary to the administration of the case" under §330(a)(4)(A)(ii)(II). The *Pro-Snax* test that currently prevails in the Fifth Circuit is a more stringent test than is employed in other circuits; however, the Fifth Circuit recently granted rehearing *en banc* to reconsider that standard. See *Barron & Newburger, P.C.* v. *Tex. Skyline, Ltd. (In re Woerner)*, 758 F.3d 693 (5th Cir. 2014) (Prado, J., joined by Reavley and Owen, J.J., specially concurring) (urging full court to reconsider *Pro-Snax* standard *en banc*).

of the statute subclause II of § 330(a)(4)(A)(ii), which expressly requires analysis not only of the benefit to the estate, but also whether the services were "necessary to administration of the case." 11 U.S.C. § 330(a)(4)(A)(ii)(II).[10]

3. The reason both subclauses of § 330(a)(4)(A)(ii) must be considered in determining whether compensation for fee defense is prohibited is because it contains a negation of the disjunctive. While, ordinarily, "[u]nder the conjunctive/disjunctive canon, *and* combines items while *or* creates alternatives," Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 116 (2012), a provision that begins with a negative "can cause subtle interpretive problems" regarding the meaning of the normally disjunctive "or." *Ibid.* Indeed, it appears it is such a "subtle interpretive problem" involving the word *or* that undermines the soundness of the decision below.

As Scalia and Garner explain, under what has been called "DeMorgan's Theorem," because the provision begins with a negation of what follows, *not (I) or (II)* means *not (I) and not (II).* See *id.* at 119 ("'not A, B, or C" means "not A, not B, *and* not C'"); see also *Schane* v. *Int'l Brotherhood of Teamsters*

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[10] From that point on, the opinion's analysis focuses on the "reasonableness and necessity *to the debtor's estate*" rather than on the reasonableness and necessity to the administration of the case. Toward the end, the opinion states in passing that "as has been discussed, Section 330 is not fairly read to include 'fees for defense of fees' * * * as reasonable, necessary costs of case administration," but the opinion actually previously only discussed whether the fees were of *benefit to the estate*. See *id.* at 20a.

Union Local No. 710 Pension Fund Pension Plan, 760 F.3d 585, 589 (7th Cir. 2014) ("In propositional logic, this move – the rule of inference that *not (X or Y)* is equivalent to *not X and not Y* – is known as one of 'De Morgan's Laws.'") (citing Lawrence M. Solan, *The Language of Judges* 49 (1993)); *U.S.* v. *One 1973 Rolls Royce, V.I.N. SRH-16266*, 43 F.3d 794, 815 (3d Cir. 1994) ("Under DeMorgan's Theorem the denial of the alternation [not (A or B)] is equivalent to the conjunction of the denials [not A and not B]."). Accordingly, the conditions of both subclauses (I) and (II) of § 330(a)(4)(A)(ii) must be met before a bankruptcy court is prohibited from allowing compensation to officers.

Thus, according to *DeMorgan's Theorem*, § 330(a)(4)(A)(ii)[11] is to be read as:

Action	Condition #1 (§330(a)(4)(A)(ii)(I))	Condition #2 (§330(a)(4)(A)(ii)(II))
The court shall not allow compen-sation *if*	The compensation is for services that were not reasonably likely to benefit the debtor's estate *and*	The compensation is for services that were not necessary to the administration of the case.

[11] Section 330(a)(4)(A)(i), prohibiting the allowance of compensation for the "unnecessary duplication of services," is not at issue here. Under DeMorgan's Theorem, § 330(a)(4)(A) would prohibit payment of compensation if the services were "unnecessar[il]y duplicat[ive]" under § 330(a)(4)(A)(i), *or* if the services were *both* not beneficial to the estate *and* not necessary to the administration of the case under § 330(a)(4)(A)(ii).

Thus, in order for the § 330(a)(4)(A)(ii) prohibition to apply, it must be shown that the services requested to be compensated are *both* not of benefit to the estate *and* not necessary to the administration of the case. The Fifth Circuit erroneously focused only on the first condition, and its resulting analysis is, therefore, flawed.

Furthermore, the Fifth Circuit's erroneous requirement that compensation *must* be for services that benefit the estate without consideration of whether, alternatively, those services are necessary to the administration of a case, effectively renders superfluous § 330(a)(3)(C), which provides that in determining the *amount* of compensation, the court may consider "whether the services were *necessary to the administration of*, or beneficial" toward the *completion of a case*, at the time they were rendered. See 11 U.S.C. §330(a)(3)(C) (emphasis added). Under the Fifth Circuit's reading of § 330(a)(4)(A)(ii), a bankruptcy court could never award compensation for services relating purely to the administration of a bankruptcy case notwithstanding a finding that the requested compensation is reasonable in amount based solely on § 330(a)(3)(C).

Thus, even if petitioners' fee-application defense did not benefit the estate, as the Fifth Circuit concluded,[12] the bankruptcy court was not

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[12] *Amicus* does not agree with the Fifth Circuit's conclusion and, thus, does not concede that the fees incurred did not benefit the estate; on the contrary, they were expended toward determining the amount of compensation owed for professional fees under procedures required by the Bankruptcy Code and Federal Rules of Bankruptcy Procedure, which, in this case,

categorically barred from allowing such compensation under § 330(a)(4)(A) because the defense was necessary to the administration of the case.

4. Reviewing the fee application process and its importance to case administration helps to confirm the necessity of fee application defense work. In practice, in order to comply with § 330 and satisfy the detailed requirements of Rule 2016 of the Federal Rules of Bankruptcy Procedure, officers submit detailed, formal "fee applications" to the bankruptcy court for approval under § 330. Interested parties (as authorized by § 330(a)(2)) may object to the requested fees. If such objections are not resolved consensually among the parties involved, the bankruptcy court holds a hearing, as happened in this case. Objections to the requested compensation of officers are an ordinary part of the case administration process by which officers are compensated (though, in practice, most fee objections are not as extensive as those asserted in the instant case). See *infra* discussion at section C.

The fee application, any objections, consideration and resolution by the bankruptcy court of the application and any objections, and final authorization of the payment of officer compensation, together, comprise a critical piece of a bankruptcy court's administration of a bankruptcy case, in accordance with the Bankruptcy Code and Federal Rules of Bankruptcy Procedure, and, thus, all fall

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were fees to defend compensation to a law firm that, under any standard of measure, provided superior results to the estate and its creditors in the face of substantial complexity, adversity, and cost.

within § 330(a)(4)(A)(ii)(II). See Pet. App. 47a (quoting *In re Worldwide Direct*, 334 B.R. 108, 111-12 (Bankr. D. Del. 2005) (explaining that the "no benefit to the estate" argument is not the only premise for awarding fees after confirmation because such a dispute "must be dealt with as part of the administration of the case" and thus may be allowed as fees "necessary to the administration of th case" under § 330(a)(4)(A)(ii)(II))).[13] Furthermore, any court-approved compensation to be paid to officers is statutorily granted "administrative expense" status under § 503(b)(2), which allows for their payment ahead of other unsecured creditors in the process of administering the bankruptcy case. See 11 U.S.C. § 503(b)(2) (providing for the allowance of administrative expenses for "compensation and reimbursement awarded under section 330(a) of this title").

5. The Fifth Circuit misconstrued § 330(a)(6) as a basis for categorically disallowing fees incurred defending a fee application, see Pet. App. 16a, concluding that compensation for defense of fees could not be fit into subsection (a)(6) because that subsection "is clearly different from authorizing fees for the defense of the application in a court hearing,"

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[13] In the decision below, the Fifth Circuit hypothesized generally that professionals who properly submit detailed, itemized billing records in compliance with the Federal Rules of Bankruptcy Procedure "ordinarily" will face fewer fee challenges, and that any such satellite litigation that is instituted "ordinarily" will be less successful. See *id.* at 17a. But, that "ordinar[]y" circumstance did not occur in the case below in which substantial retributive objections were lodged despite adherence to those procedures.

and "tailoring the award to the 'level and skill reasonably required to prepare the application' emphasizes scrivener's skills over other professional work." *Ibid.*[14] The court's reading is flawed because it fundamentally misunderstands the permissive and general nature of § 330(a), as well as the nature of § 330(a)(6). Section 330(a)(6) does not itself *authorize* payment of fees for fee application preparation, rather, it limits the amount of such payment of "[a]ny compensation awarded" under the general provisions of § 330(a) such that it is "based on the level and skill reasonably required to prepare the application." 11 U.S.C. § 330(a)(6).[15] Compensation for such fees would be awarded—just as compensation for defense fees—under the general permissive authority of § 330(a)(1). Indeed, the fact that § 330(a)(6) clearly contemplates that compensation for the *preparation of a fee application* could permissibly be paid under the "benefit" and "necessity" tests of § 330(a)(4), strongly supports the idea that *defense* of a fee application could likewise satisfy the requirements of that provision. Certainly, § 330(a)(6) cannot be read to imply a *prohibition* on compensation for defense of fee applications, a subject that provision simply does not address.

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[14] See Pet. App. 16a. As mentioned *supra* at n.8, the Fifth Circuit's discussion of § 330(a)(6) appears to contain a typographical error as it references § 330(a)(4) rather than § 330(a)(6).

[15] The proscription that fees awarded for the *preparation* of fee applications be limited to the "level and skill reasonably required to prepare" such an application under § 330(a)(6) serves to prevent persons with high hourly rates from billing excessive amounts for a relatively ministerial task.

The Ninth Circuit's decision in *Smith* strongly supports this conclusion, correctly determining that nothing in the language of § 330 (including § 330(a)(6)) forbids compensation for the defense of fee applications if such compensation otherwise meets the requirements of § 330. *In re Smith*, 317 F.3d at 928. Moreover, that conclusion is consistent with prior Ninth Circuit precedent in *In re NuCorp Energy, Inc.*, 764 F.2d 655, 659 (9th Cir. 1985), which was "codif[ied]" by the legislative enactment of § 330(a)(6). See 3 Collier on Bankruptcy ¶ 330.03 [16][a][i] (Alan Resnick & Henry J. Sommer eds., 16th ed.) ("Section 330(a)(6), added to the [Bankruptcy] Code in 1994, represents a codification of *NuCorp* * * * "). In *NuCorp*, the Ninth Circuit ruled that professionals' costs to comply with fee *application* requirements in bankruptcy courts are necessarily compensable under § 330 because they are "actual and necessary services," and the court further explained, in dicta, that time spent *litigating* fee awards should also be compensable for the same reasons. See *NuCorp*, 764 F.2d at 658-62; *Smith*, 317 F.3d at 928.

Contrary to the Fifth Circuit's mistaken conclusion that compensation for fee application defense is categorically prohibited under § 330(a) because it does not generally benefit bankruptcy estates, see Pet. App. 1a-21a, the Ninth Circuit correctly concluded that such compensation may be authorized under § 330(a) because such fees are "necessary for the administration of the case" *and* also "provide[] a benefit to the debtor's estate in determining the amount of administrative fees that the estate owe[s]." *In re Smith*, 317 F.3d at 928-29.

This rationale fully accords with *NuCorp*, which explained that its rationale is consistent with the legislative intent behind § 330 of ensuring (a) compensation for bankruptcy attorneys commensurate with that earned by attorneys in non-bankruptcy cases and (b) the repudiation of judicial decisions holding that compensation of attorneys in bankruptcy proceedings was subject to the overriding concern of preserving the estate. See *Smith*, 317 F.3d at 928; *NuCorp*, 764 F.2d at 658-62.

In summary, there is nothing in § 330(a) that prohibits compensation for defense of fee applications. Such compensation is necessary to case administration under § 330(a)(4)(A)(ii)(II), and, thus, it is not disallowed under § 330(a)(4)(A). Because the Fifth Circuit's opinion did not substantively address the case administration aspect of the fees at issue, its ruling conflicts with the language of § 330(a) and should be reversed.

B. The Fifth Circuit's Rule Burdens Estate Officers And Incentivizes Fee Structuring Arrangements That Impose Costs On All Bankruptcy Estates

The Fifth Circuit's decision below that officers can never be compensated under § 330(a) for defending their fee applications in bankruptcy cases incentivizes professional persons to implement higher fee structures, to be borne by future trustee, debtor in possession, or official committee-clients, or else face fee dilution. This unpalatable reality is readily apparent in the Fifth Circuit's acknowledgement that: "When firms become aware that they may not be reimbursed for defending core fee applications [in

the Fifth Circuit], they can anticipate this possibility in their hourly rates and by thoroughly documenting fee applications." Pet. App. 18a n.7.

As an empirical matter, it is not clear whether that will happen. An American Bankruptcy Institute ("ABI") report on professional compensation published in 1991 (the "Report") noted that the survey data from judges and lawyers "suggest that professionals have not adjusted their hourly rates in those districts where no such compensation [for defense of fee applications] is available." G. Ray Warner & Keith J. Shapiro, *American Bankruptcy Institute National Report on Professional Compensation in Bankruptcy Cases*, 61 & n.49 (LRP Publications, 1991), *available at* http://goo.gl/Eqryym. In the Report, which reflects the most recent relevant data gathered on this issue, the ABI observes that: "One might expect that professionals who do not generally receive compensation for the time spent preparing *and presenting* fee application[s] might adjust their hourly rates upward to recover this cost. The survey data, however, do not indicate that lawyers have responded in this fashion." *Id.* at 198 (emphasis added), *available at* http://goo.gl/5uPpQM.

Unless rates *are* adjusted to account for the possibility of fee dilution in the face of fee objections, there is a real risk that bankruptcy practitioners "will not remain in the bankruptcy field."[16] Indeed, the legislative history makes clear that, in amending § 330, Congress sought parity with non-bankruptcy practitioners for the very purpose of avoiding that

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[16] See H.R. Rep. No. 95-595, at 330 (1977).

result.[17] The effect of uncompensated fees for defense of fees falls especially hard on smaller bankruptcy firms, which, because of their size, are unable to spread the risk of undercompensation against a greater number of cases.

Moreover, building in a safety net through higher fees charged to trustee, debtor in possession, or official committee-clients in all cases unfairly burdens those bankruptcy estates whose professionals ultimately do not face fee objections that must be defended. This outcome is inequitable and further supports the need for bankruptcy courts to utilize the discretion they have been given in § 330 to award compensation for defense of fee applications in those cases where the facts justify doing so. Moreover, such risk-adjusted higher fees may well run afoul of the recently implemented United States Trustee Guidelines that require evidence that rates charged are not higher merely because the case arose in bankruptcy. See 78 F.R. 36248-02, 2013 WL 2902995 (F.R.), at *36255 (June 17, 2013).

C. The Fifth Circuit's Ruling Will Increase Meritless Fee Litigation

The filing and administration of bankruptcy cases, and the related compensation of officers under § 330, constitute a substantial nationwide legal practice.

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[17] *Id.* (explaining that § 330 is intended to incentivize "bankruptcy specialists, who enable the system to operate smoothly, efficiently, and expeditiously" to keep practicing law in the "bankruptcy arena" in order to prevent the field from being occupied only by attorneys who could not find other work or who practice bankruptcy law occasionally "almost as a public service").

According to federal government figures for 2013 and 2014, approximately one million bankruptcy cases are filed in the United States each year, and roughly 1.4 to 1.5 million bankruptcy cases are pending at any given time.[18] If allowed to stand, the Fifth Circuit's decision will give trustees, debtors, reorganized debtors, and other parties in interest incentives to challenge the fees of officers for the purpose of reducing the net fees those officers will be paid for their services. The perverse incentive to threaten litigation that, even if unsuccessful, will result in unpaid legal fees and expenses will likely increase fee litigation because objectors will face zero risk of bearing the cost of paying the fees and expenses for fee defense.[19]

Indeed, the fees of officers are already frequently litigated. According to an ABI study based on cases filed in 2004, in approximately 10% of chapter 11 cases, parties objected to the lead debtor's counsel's fees, and in large chapter 11 cases, that percentage swelled to almost 20%. See *Presentation of the Landmark ABI Fee Study: Conclusions and Ramifications* 8, ¶¶ 15-16 (American Bankruptcy Institute, Winter Leadership Conference 2007),

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[18] See U.S. Bankruptcy Courts – Business Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending September 30, 2013 and 2014, *available at* http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2014/0914_f.pdf.

[19] Although Rule 9011 of the Federal Rules of Bankruptcy Procedure may prevent some meritless objections to officer compensation, objections, nevertheless, may be designed to dilute officer compensation without crossing the line into sanctionable behavior. See Pet. Br. 55.

available at http://goo.gl/zZltxr; Stephen J. Lubben (Reporter), *Chapter 11 Professional Fee Study* 35 (American Bankruptcy Institute, 2007). With changed incentives under the Fifth Circuit rule, such objections are likely to increase further.

D. The Issue Is Of National Importance To All Officers

As the Fifth Circuit itself explicitly acknowledged, the issue before the Court affects *all* officers of a bankruptcy estate: "The issues presented transcend debtor's counsel, because Section 330(a) governs compensation of *all professionals* whose fees are paid by the bankruptcy estate" including "a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103," including any "attorney" and "any paraprofessional person employed by any such person * * * " Pet. App. 14a & n.6 (emphasis added).[20] Accordingly, affirmance of the Fifth Circuit's ruling would negatively affect the employment and compensation not only of attorneys in bankruptcy cases,[21] but also a host of other

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[20] Professionals employable under § 327 extend to "attorneys, accountants, appraisers, auctioneers, or other professional persons." 11 U.S.C. § 327(a). Section 1103 addresses "attorneys, accountants, or other agents, to represent or perform services" for creditors' and equity security holders' committees appointed under § 1102. 11 U.S.C. § 1103(a); see also *id.* at § 1102.

[21] Furthermore, the term "attorneys" is not limited to bankruptcy practitioners. When a law firm is engaged to represent an estate, lawyers across many legal disciplines within that firm—finance, mergers & acquisitions, tax,

officers, such as trustees, ombudsmen, examiners, accountants, appraisers, financial advisors, sale advisors, and experts engaged by bankruptcy estates.

* * * * *

If the Fifth Circuit decision is not reversed, it will have significant impacts on bankruptcy practice nationwide by creating incentives to file meritless objections to fee applications. The resulting risk of nonpayment even for defending against fee challenges that *were found to lack merit* will, foreseeably, either drive restructuring professionals to new fields and industries, or force them to pass on these necessary "costs of doing business," Pet. App. 17a-18a, in the form of higher rates to be paid by every bankruptcy estate and its creditors. Fortunately, the language of § 330(a) does not require that result.

CONCLUSION

The Fifth Circuit's ruling below should be reversed.

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employment, environmental, commercial litigation, appellate, and securities, to name a few—are frequently involved in the representation working alongside and in collaboration with bankruptcy lawyers.

Respectfully submitted.

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